APPENDIX

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 70-5055

RAYMOND SMITH AND MELVIN MCCLAIN
Petitioners,

—v.—

FLORIDA,
Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

PETITION FOR CERTIORARI FILED DECEMBER 14, 1970
CERTIORARI GRANTED JUNE 14, 1971

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IN THE CRIMINAL COURT OF RECORD
IN AND FOR DADE COUNTY, FLORIDA

No. 68-6546 (A)
(B)

STATE OF FLORIDA, PLAINTIFF

v.

RAYMOND SMITH AND MELVIN GRAHAM MCCLAIN,
DEFENDANTS

Miami, Florida

Wednesday, December 18, 1968

The above-entitled case came on for trial before the Hon. Jack M. Turner, Judge of the above-styled court, at 3151 Northwest 12th Street, Miami, Florida, on Wednesday, December 18, 1968, at 10 o'clock a.m., pursuant to notice.

APPEARANCES:

BARBARA D. SCHWARTZ, ESQ., Assistant State Attorney, on behalf of the State of Florida.

PHILLIP A. HUBBART, ESQ., Assistant Public Defender, on behalf of the Defendants.

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EXHIBITS

[fol. 3] MRS. SCHWARTZ: Raymond Smith and Melvin Graham McClain.

MR. HUBBART: Your Honor, at this time I would like permission to dictate a motion to dismiss into the record with respect to Count One.

COURT: All right.

MR. HUBBART: Comes now the defendants, Raymond Smith and Melvin Graham McClain, and respectfully moves this Honorable Court to dismiss Count One of the Information filed in this cause on the ground that Florida Statute 856.02 is void for vagueness under the 14th Amendment to the United States Constitution; particularly that section of Florida Statute 856.05, which proscribes, "wandering and strolling around from place to place without a lawful object."

That particular section of the statute I maintain is a violation of the due process clause of the 14th Amendment because it is void for vagueness; it has no ascertainable standard of guilt stated therein, and under the United States Supreme Court decision of Lanzetta versus New Jersey, any state criminal statute which fails to state an ascertainable standard of criminal guilt in a criminal statute is void for vagueness and is unconstitutional.

Accordingly the Count, Count One, which is based on that particular section of the statute, we submit [fol. 4] should be dismissed in this cause.

THE COURT: All right. I will deny the motion. I find that the statute is crystal clear.

All right, let's swear the witnesses.

(Thereupon the witnesses and defendants were duly sworn by the Clerk.)

MR. HUBBART: Your Honor, I would like to invoke the rule on witnesses.

MRS. SCHWARTZ: Really, I have one witness. The other is just about the ownership of the car and the railroad.

MR. HUBBART: Oh, all right. Your Honor, I will withdraw that.

Is Mr. Hastings in Court here?

MRS. SCHWARTZ: No, that is why I asked you if you wanted it notarized, or we can bring the vice president before the—

MR. HUBBART: Well, this doesn't, I think, fall under the statute.

MRS. SCHWARTZ: Well, of course, the new court decisions you don't really have to prove anything but that it didn't belong to the people who—

MR. HUBBART: Well, I do not want to stipulate to the admission of that in evidence.

[fol. 5] MRS. SCHWARTZ: Okay.

Thereupon—

WALLACE W. CORBIN

was called as a witness by the State, and having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MRS. SCHWARTZ:

Q State your name and official position, please.

A Wallace W. Corbin, Special Agent, Seaboard Coast Line Railroad.

Q Were you so employed on the 13th of November, 1968?

A Yes, ma'am.

Q Did you have occasion to see Raymond Smith and Melvin G. McClain?

A Yes, ma'am.

Q Can you identify them for the Court?

A Yes, the man in the yellow shirt is Smith (indicating); the other is McClain.

Q And can you tell us the approximate time and place and circumstances that you saw them on that date?

A It was approximately 7:55 in the evening.

Q Where?

A When I first observed the three—there was one [fol. 6] other man with them—they were walking south on the west side of the roadway at Northwest 37th Avenue.

Q Whose property is this?
A It's a city street.
Q What did you observe?
A Well, when I passed the three men, they were in full view of my head lights on my automobile as I passed them, then I looked up in the rearview mirror and the three ran from the west side to the east and in behind some freight cars at Colonial Warehouses.
Q Then what happened?
A Well, I parked just north, off from the warehouse, at Valleydale Meats by the office, got out and I notified my yard office to call Hialeah, and as I had men go in behind the freight cars to cover 37th Avenue and 71st Street.
Q Then what happened?
A Then I got on the west side of 37th Avenue adjacent to the car on the north end of the track.
Q What car?
A That car is a—
Q No, what kind of a car?
A Freight, car, box car.
Q Belonging to who?
A It belonged to my company.
[fol. 7] Q Which is?
A Seaboard Coast Line Railroad.
Q A corporation?
A Yes, ma'am.
MRS. SCHWARTZ: We would like to have the Corporate Certificate at this time.
Q (By Mrs. Schwartz) Go ahead. What did you see?
A When I positioned myself on the road, I could see. I could not see the men at this time, but I could hear the noises which is familiar to me as a door hasp—
MR. HUBBART: Your Honor, I am going to object to that. He can describe what he heard, but his opinion of what he was hearing is inadmissible.
I assume that is what he is going to testify to.
THE COURT: Well, he can testify to the sounds, I don't know how you can—

MR. HUBBART: Well, I object to any conclusions or opinions.

THE COURT: Well, I will sustain the objection. Just tell us what you actually heard.

THE WITNESS: I could hear clanking of metal and I could hear the—more or less a scraping or a squeaking sound, which I identified as, having worked these doors previously—

[fol. 8] MR. HUBBART: I am going to object to any conclusions.

THE COURT: Well, I will overrule the objection here. He is saying that—

MR. HUBBART: Well, he is going to identify what he thinks it is.

THE COURT: Well, not what he thinks; what he has heard from long years of experience.

MR. HUBBART: Well, I object to him testifying then as an expert witness. I don't think he could be qualified. I don't think this is a matter for expert opinion.

THE COURT: Well, I will overrule your objection.

THE WITNESS: Well, the squeaking and more or less rusty sound of a door lever being tampered with.

MR. HUBBART: Your Honor, object to that and move to strike. I think that is a conclusion, an opinion. He did not see any of this. He is hearing this. I'm going to move to strike it.

THE COURT: All right. I will grant your motion to strike what it sounded like, except the grating or squeaking noise.

MR. HUBBART: He heard some noises.

THE WITNESS: Well, I heard these noises coming from behind the freight car.

Q (By Mrs. Schwartz) That would be the movement [fol. 9] of what?

MR. HUBBART: Object, Your Honor, that calls for a conclusion.

THE COURT: I'll sustain it.

Q (By Mrs. Schwartz) Then what, if anything, did you do?

A Well, I waited for, oh, "X" number of minutes and the defendant Smith (indicating) came running from behind the north car and went in a northerly direction. There's a building there which blocks any way of leading out than coming back out, and at that time I identified myself and stopped him.

Q What happened with the other two?

A The other two were stopped at 37th Avenue—

MR. HUBBART: I will object to this unless this officer actually stopped them.

Q (By Mrs. Schwartz) Did you see them stopped?

A No, ma'am.

Q Did you see them after they were stopped?

A Yes, ma'am.

Q Where did you see them and when in proximity to when you had stopped Smith did you see them?

A A Hialeah plainclothes car came by at the time I was apprehending Smith. At this time he told me that—

MR. HUBBART: Your Honor, I am going to object [fol.10] to the hearsay.

Q (By Mrs. Schwartz) Don't tell us what he told you. Tell us what you people did.

A Well, at this time it was learned—

THE COURT: Well, as to Smith, of course, he can testify.

MR. HUBBART: I believe he is testifying as to an officer.

THE COURT: He is, as to what the officer told him; but if it was in the presence of Smith, he can testify, as far as that is concerned, but I would exclude it as to McLain.

Go ahead. What did the officer say?

THE WITNESS: He just told me that—

MR. HUBBART: Well, there is no showing as yet that Smith heard all of this.

Q (By Mrs. Schwartz) Was Smith with you at the time?

A Smith was in my presence, yes.

Q When the officer was talking to you?

A Yes.

Q All right. What did he say?

A I was informed that two other men had been stopped, that beyond 7—it would be on 71st Street east of 87th Avenue.

[fol. 11] Q What did you do then?

A We went around to where the other cars were, which were other units of the Hialeah Police Department.

Q Did you see the other two then?

A Yes, ma'am.

Q Were they the same two that were with Smith when you originally saw him?

A They were.

Q And is one of them the other defendant here, Mr. McClain?

A Mr. McClain (indicating).

Q Did you go back to the railroad car?

A Yes, ma'am.

Q What did you observe about the railroad car, if anything?

A The seal had been removed from the locking hasp.

Q Would you describe it or show it to us or—

MR. HUBBART: Your Honor, I am going to object to the word, "removed". It wasn't there or it was there, but as to how it got off I think is a conclusion.

THE COURT: Well, it was removed if it wasn't there, whether it be through nature or something else.

MR. HUBBART: All right.

Q (By Mrs. Schwartz) Would you describe the seal [fol. 12] and what you are referring to?

A The seal is a locking device with a number on it which is coded for various railroads and shippers and what have you. It's a sealing device which locks and it must be broken or cut to be removed once it's applied.

Q Do you have it with you?

A Yes, ma'am.

Q May we see it, please?

A (The witness indicating.)

MRS. SCHWARTZ: We will offer this into evidence.

Q (By Mrs. Schwartz) Now, will you tell us where that fits or how it works, what it goes into—

MR. HUBBART: If it's being offered into evidence at this time, I am going to object to it because I don't think it has been properly identified.

MRS. SCHWARTZ: We'd offer it for identification at this time.

(The item referred to was thereupon marked, "State's Exhibit 1-A for Identification.")

Q (By Mrs. Schwartz) Now, would you tell us where you got this particular seal from?

A This particular seal is the Illinois Central Railroad seal, which was applied where the car was loaded, and it is numbered.

[fol. 13] This seal was lying under the hasp locking device on the ground.

Q Now, had you passed this particular car prior to this incident?

A Yes, ma'am.

Q How long ago?

A Three or four minutes.

Q Was it at that time locked?

A Yes, ma'am.

Q Are you sure?

A I'm positive. Because when this seal is on the hasp this way (indicating), you have a tendency to pull them and bend them where they will face out and that's for purposes of a later check, they can be flashed.

Q So after the noises you heard and the apprehension of these defendants you went back and checked the car and you found this laying there?

MR. HUBBART: Your Honor, I object to this. It is leading and repetitious.

THE COURT: Well, I think the summation is. Sustain your objection.

MRS SCHWARTZ: All right. We'd offer this into evidence at this time.

MR. HUBBART: I am going to object to the admission of the exhibit in evidence.

[fol. 14] THE COURT: Overrule the objection.

THE CLERK: State's Exhibit 2.

(The item referred to was thereupon marked, "State's Exhibit 2.")

Q (By Mrs. Schwartz) What was in the railroad car itself? What was the approximate value, if you know, that was in the railroad car?

MR. HUBBART: I am going to object to the question on the grounds that this witness has not been qualified as an expert on the value, the market value, if any, of any property, if any, that was inside this car.

THE COURT: All right, I will sustain the objection. Let's just get into telling me what was in the car.

Q (By Mrs. Schwartz) What was in the car?

A The car was a full load of—.

Q What do you mean by "full load?" Before you say full load—

A Well, all the merchandise in this particular car was shipped from shipper, and it contained paper products from Kimberly-Clark and Sanitary Pads.

Q About how many cases would you say—or was it a whole—The car was completely loaded?

A Yes, ma'am, it was a full load.

[fol. 15] Q Did this all occur in Dade County, Florida?

A Yes, ma'am.

Q Approximately at what point was this on 71st Street?

A Colonial Warehouse is on the east side of Northwest 37th Avenue, and north of Northwest 71st Street. It's in that corner, and the building extends for approximately a block; so where the defendant Smith was apprehended would be roughly in the neighborhood of 72nd Street, say.

Q Now, from where they were apprehended, where was the car approximately?

A It would be approximately 72nd Street, east of Northwest 37th Avenue.

Q In what, the twenty-six hundred block?

MR. HUBBART: Object to that, Your Honor, as leading.

MRS. SCHWARTZ: I'm sorry.

Let me ask you one other question, please.

THE COURT: I will sustain the objection to your last question.

Q (By Mrs. Schwartz) Did you have any conversation with the defendants?

A None other than—

MR. HUBBART: Your Honor, I am going to object to any conversations. He can answer whether he had any [fol. 16] conversations or not, but I assume at this point he is going to go into it and I object to it.

THE COURT: Yes, just answer, "yes" or "no" if you had a conversation about this with the defendants.

THE WITNESS: Yes.

Q (By Mrs. Schwartz) Did the officers have any conversation with them?

A I couldn't say.

Q Prior to your having any actual conversation did you make any statements to them?

A Yes, ma'am.

Q What statements did you make?

A I advised all three men of their rights.

Q What did you say to them?

A First I identified myself to all three, which I had done previously to defendant Smith, and advised them what they were being placed under arrest for.

I told them that they had the right to remain silent, that any statement they made to me would be used in court against them, that they had the right to an attorney if they did answer any of my questions, if they did not have funds for one, one would be provided for them.

Q What did they say, anything to that?

A No, ma'am. One man said that he had an attorney that he would call.

[fol. 17] Q Did Smith and McClain say whether or not they wanted an attorney at that time?

A No, nobody made no statements.

Q Did you ask them any questions?

A Yes, ma'am.

Q What did you ask them and what did they answer?

MR. HUBBART: Your Honor, I am going to object. Improper predicate under the Miranda decision.

THE COURT: All right, I will overrule the objection, unless you want to voir dire.

MR. HUBBART: No, sir.

THE COURT: All right.

Q (By Mrs. Schwartz) Go ahead.

A I didn't question Smith at all because I got him coming around the car, but when I attempted to question McClain and the third defendant, they said—

Q Just refer to McClain at this time.

A Well, when I questioned McClain he stated that they had just come from some place of business north of the Colonial Warehouse and they weren't behind the freight cars at all.

MRS. SCHWARTZ: I have no further questions.

[fol. 18] CROSS EXAMINATION

BY MR. HUBBART:

Q This particular area that you have been testifying about, is this at or near the property of the Seaboard Airline Railroad Company?

A No.

Q Are there any box cars in this area where you placed these two defendants— Strike that.

Are there any box cars in the area where you placed the defendant Smith under arrest?

A Yes, sir.

Q Approximately how many railroad cars and box cars would you say are in that particular area?

A This particular night there were five; two loads and one empty.

Q This particular night were you on foot or in a car?

A Both.

Q Well, at the time you first saw the defendants you were in a car; right?

A Patrolling, yes, sir.

Q When was the first time you saw the box car in question that night?

A This particular box car had been checked three or four minutes prior to me seeing the defendants.

[fol. 19] Q Did you check it?

A Yes, sir.

Q Do you know whether you were on foot at the time?

A When I checked the car I was on foot, yes sir.

A And did you check the other box cars?

A The other load?

Q How about the other box cars on the railroad?

A Yes, sir.

Q You checked all of them?

A Well, there was three empties and two loads. The two loads were checked, yes, sir.

Q You say, "we"; was there somebody with you?

A No, myself.

Q Now, when you first arrested the defendants—I believe you said the defendant Smith; is that correct?

A Yes, sir.

Q The defendant McClain was not in his presence; is that right?

A No, sir, he was not.

Q You had to transport Smith to McClain; isn't that right?

A Yes, sir.

Q And McClain was in the company of another man?

[fol. 20] A Yes, sir.

Q When you took Smith to McClain, did you have to put him in an automobile, or did you go on foot?

A When we took Smith to McClain, no, sir, he was placed in the police cruiser.

Q Then you drove to the spot where McClain was; is that correct?

A Yes.

Q And approximately what distance was that; about six blocks or so?

A No, sir, that's— A rough estimate would be possibly a block. It was in the parking lot of Colonial Warehouse, where they park their trucks, which is on the south end of the building.

Q This all happened around 8 o'clock in the evening; is that correct?

A Thereabouts, yes, sir.

Q And your testimony is that you did not have a conversation with Smith about his whereabouts; is that right, just McClain?

A I talked with McClain about— I had Smith coming from behind the car.

Q You had already arrested Smith?

A Yes, sir.

Q You had a conversation with McClain?

[fol. 21] A Yes.

Q Don't tell me. I just want to know—

A Yes, sir.

Q —you had a conversation with Smith?

A Yes, sir.

Q You had a conversation with both of them?

A Both of them after we got around to the other side, yes, sir.

Q Now, you did not personally observe either one of these two men breaking and entering any railroad cars; is that correct?

A No, sir, I did not.

MR. HUBBART: No further questions.

Mrs. Schwartz: Your Honor, the State rests.

MR. HUBBART: Your Honor, we are going to move for a judgment of acquittal with respect to both Count One and Count Two of the Information, on the grounds that the State has failed to establish a prima facie case of vagrancy as alleged in Count One, and the State has failed to establish a prima facie case of attempted breaking and entering of a railroad car as alleged in Count Two.

THE COURT: All right. I am going to deny the motion.

[fol. 22] Thereupon—

RAYMOND SMITH

one of the defendants herein, was called as a witness on his own behalf, and having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. HUBBART:

Q Mr. Smith, would you state your name, please?
A Raymond Smith.
Q How old are you, sir?
A Twenty-four.
Q Where do you reside; where do you live?
A I live at 1629 Northwest 40th Street.
Q How long have you lived here in Dade County?
A Three years, sir, maybe a little better.
Q Now, were you employed at the time you were arrested?
A Yes, sir.
Q Where were you employed, sir?
A Food Fair Warehouse on 32nd Avenue and 71st Street.
Q How long have you been so employed?
A Two and a half years.
Q What kind of work did you do there?
A I load beef, swinging beef.
[fol. 23] Q Let me call your attention to the date in question, November the 13th, 1968; did you on that date know the gentleman who is standing next to you, Mr. Melvin McClain?
A No, sir, I had never seen him before.
Q All right. Did you on that date attempt to break and enter a railroad car?
A No, sir.
Q Do you remember this gentleman standing right next to you?
A Yes, sir, I remember him.
Q You remember him placing you under arrest?
A Yes, sir.
Q Would you tell the Judge in your own words the circumstances under which you were placed under arrest and what you were doing in that area, sir?
A Yes, sir. Your Honor, I was walking down 37th Avenue going to Hialeah and that gentleman over there, he came from across the street with a shotgun and told

me to halt, so I stopped and put my hands up and he asked me where was I going and I told him I was going to Hialeah to a bar.

So this car came up and he put me in the car and brought me back around to 71st Street and 32nd Avenue, and this man and another man was standing there. [fol. 24] So he asked them, "Do you all know him?" They said, "No."

He asked me. I told him, "No," I didn't know them, and so he stood there and some more patrol cars came up; and the next thing I knowed I was in the car.

Q What were you doing in that area?

A I just left a bar. I was going to Hialeah?

Q What were you doing in Hialeah?

A I was going to meet a girl. I been going with her about two years.

Q What time was this?

A Between 7:30 and 8 o'clock, because I left the Perry Bar at 7:30.

Q Had you been in the company of Mr. McClain during that evening prior to your arrest?

A No, sir, I had never seen the man.

Q At the time you were placed under arrest, where were you?

A I was going down 37th Avenue.

Q Were you on the public street?

A Yes, sir.

Q Were you wandering and strolling around from place to place without a lawful object?

A No, sir, I was going to Hialeah just like I told him. That's were I was going and he stopped me. [fol. 25] He throwed the shotgun on me; and next thing I know there was a car pulled up. He told me to get in.

MR. HUBBART: Your witness.

CROSS EXAMINATION

BY MRS. SCHWARTZ:

Q Had you just come from behind the freight cars?

A No, ma'am, I was walking down 37th Avenue.

Q You never were behind the freight cars at all?

A No, ma'am.
Q He just picked you up off the street?
A Just walking down the street.
MRS. SCHWARTZ: No further questions.

Thereupon—

MELVIN GRAHAM McCLAIN

one of the defendants herein, was called as a witness on his own behalf, and having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. HUBBART:

Q Would you state your name, please, sir?
A Melvin McClain.
Q Where do you live?
A 3085 Northwest 56th Street.
[fol. 26] Q How old are you?
A Twenty-six.
Q Were you employed at the time you were arrested?
A Yes, sir, I worked for the City of Hialeah.
Q Hialeah?
A Yes.
Q What do you do for the city of Hialeah?
A I tote garbage.
Q How long have you been so employed?
A Off and on three years.
Q Were you employed at the time you were arrested for the City of Hialeah?
A Yes, sir.
Q Now let me call your attention to the 13th of November, 1968; did you during that evening prior to the time you were placed under arrest ever see the gentleman standing next to you, Mr. Raymond Smith?
A No, sir.
Q All right. On November the 13th, 1968, at around seven or eight o'clock in the evening did you attempt to break and enter a railroad car?

A No, sir.

Q Do you remember being placed under arrest that evening?

[fol. 27] A Yes, sir, when me and—

Q Was it this gentleman here that placed you under arrest, or another officer?

A Well, it was an officer in a police cruiser what stopped Johnny Baker and I. We was headed down the street, down to Sweet Papers.

Q And were you at the time you were placed under arrest on the public street?

A Yes, sir.

Q Were you on the sidewalk?

A Well, it was in the street.

Q Where were you going at the time?

A We was going down towards 36th Avenue.

Q Who were you with?

A Johnny Baker.

Q Where had you first met Johnny Baker that evening?

A He came by my house around about—maybe about a quarter after seven.

Q What, if anything, did you two then do?

A Well, he was going— He asked me to go to Sweet Papers with him because—

Q What is Sweet Paper now?

A That's a warehouse over in Hialeah.

Q What was the purpose of going there?

A Well, the fellow had owed him some money and he asked me to go out there with him. So we was walking out there.

Q You were going to meet somebody at this location?

A Yes.

Q How far had you gone before you were placed under arrest?

A Before I left the house?

Q From the time you— From the place where you left your house to the place where you were placed under arrest, how far was that?

A Well, we had walked about 11 blocks.

Q And how far were you from your destination when you were arrested?

A One more block. Because it was on 36th Avenue.

Q Would you tell the Court then in your own words what happened that particular evening after you were placed under arrest?

A Well, nothing. Me and Johnny Baker was headed toward 36th Avenue, that's when the police, Officer Meadows, stopped us. Then later on that's when they brought this gentleman around here and asked me did I know him (indicating).

[fol. 29] Q Let the record reflect the witness has referred to the co-defendant, Mr. Raymond Smith.

Were you that evening wandering and strolling around from place to place without any lawful purpose or object?

A No, sir.

MR. HUBBART: Your witness.

CROSS EXAMINATION

BY MRS. SCHWARTZ:

Q Do you know the freight cars that are being referred to?

A Ma'am?

Q Do you know about the freight cars, these box cars that we're discussing?

A No, I didn't see no box cars.

Q You weren't through the railroad yards at all?

A No, only thing was parked out there was some trucks, I guess, some trailers.

Q Were you near any box cars or freight cars at any time?

A No.

Q You never went through the yard?

A No.

Q I have no further questions—

[fol. 30] Were you walking or running?

A Walking.

MRS. SCHWARTZ: No further questions.

MR. HUBBART: Your Honor, at this time the defense rests.

Does the state having any rebuttal?

MRS SCHWARTZ: No, the State has rested.

MR. HUBBART: Your Honor, at this time we will renew the motion for judgment of acquittal as to both Count One and Count Two of the Information, on the ground that the State has failed to establish a prima facie cause of vagrancy as alleged in the Information, and under the statute, and the State has failed to establish a prima facie case of attempted breaking and entering a railroad car, as alleged in Count Two of the Information.

THE COURT: All right. I will deny the motion. Judge the defendants guilty as charged.

MR. HUBBART: Your Honor, I would like to make an argument, if I may, on the issue of guilt or innocence.

THE COURT: All right. I'm sorry.

Strike that adjudication.

MR. HUBBART: Your Honor, the only witness presented by the State in this case is Mr. Wallace Corbin of the Seaboard Airline Railroad Company, who testifies that he did not see these two defendants committing the [fol. 31] crime of, as alleged in Count Two of the Information, attempted breaking and entering a railroad car.

He did not see these two men committing any crime at all. He testified that he heard some clanking of metal and some squeaking noises coming from behind a freight car.

That is all he testified to. He says there are three men back there—or at least he saw three men around in that area just prior thereto. I believe his testimony was that he saw, at around 7:55, his testimony, these two men plus a third man walking south on Northwest 37th Avenue, and that when he passed them he saw them in the rearvision mirror disappear in and around apparently the area of a number of box cars.

Then a little later, if I have the testimony correct, he hears these clanking noises and so on. Then he comes up and sees one of the defendants, Mr. Smith, which he places under arrest at a point somewhat distant from the box car.

He testifies he comes back to the box car and he sees one of these seals here, which has been introduced in evidence, which has been either pulled out or tampered with in some way—and that's it.

He said he saw, I believe, the box car prior thereto and had checked it and the seal was intact; afterwards [fol. 32] he sees it and apparently it's been tampered with.

Well, this may be a prima facie case or it may be sufficient evidence if believed— Of course, we don't for a minute concede that this is a correct view of the facts, but even if we assume for a moment that it is, all the State has established is that one of these three men—not necessarily the two men standing before you—tampered with the seal on this box car.

Now, that hardly establishes that they were attempting to break and enter. Perhaps they were attempting to steal the seal or damage the outside of the box car in some way.

At any rate, it certainly doesn't establish that either one of these two defendants was doing the attempted breaking and entering, and it doesn't show that either one of these two defendants, if they were not, were assisting or aiding and abetting in some way, because again we have no direct evidence and the circumstantial evidence certainly leaves a great deal to be desired.

There is a reasonable hypothesis of innocence, even if one accepts the testimony of the sole State witness; namely, that these two defendants were simply there and the third defendant, a third man was putting his hands on the seal.

[fol. 33] That doesn't constitute aiding and abetting, simply being there, and furthermore, even if we assume that it is, the third man, which I think would be a reasonable hypothesis, was tampering with the seal, that doesn't show that he was attempting to break and enter with the purpose of stealing something inside.

I think had the door been broken into, been a hole in the place or the whole door been open and some effort made to get in to take something, I think possibly the State would have a case; but just breaking the seal,

I suggest, does not establish the case and, furthermore, it certainly doesn't establish the specific intent which is alleged, the specific intent to commit larceny: to-wit, grand larceny.

The mere fact that there was property inside the place doesn't mean that they had the intent to go in there and steal something. They may have had the intent to go in and sleep off a drunk, or if they had no place to stay, just go to sleep. That is certainly a reasonable hypothesis.

So, furthermore, both of the two defendants have taken the stand and have denied this set of facts completely, said they were not in this area, they didn't even know each other prior to this time, and they were just in the area at the time these officers came, apparently [fol. 34] some Hialeah officers—they're not here in Court—and the gentleman who has testified, Mr. Corbin, placing them under arrest.

So I would suggest to the Court that the State has not established its case beyond and to the exclusion of every reasonable doubt.

Now, one further motion I would like to make, and that is a motion to strike the testimony of Mr. Corbin with reference to the statement made by him by, I believe, one of the defendants. I believe it was McClain.

I am going to move to strike that particular portion of the testimony on the grounds that this statement was elicited from McClain in violation of his rights to counsel guaranteed by the Sixth Amendment; his privilege against self-incrimination guaranteed by the Fifth Amendment, as made enforceable by the States by the Fourteenth Amendment, as interpreted in the Miranda versus the State of Arizona.

THE COURT: What statement was that?

MR. HUBBART: The statement of what he was doing in the area.

THE COURT: I will grant that motion.

MR. HUBBART: All right.

THE COURT: All right. I will deny your motion and adjudge the defendants guilty as charged.

[fol. 35] On Count One, sentence of vagrancy, of course, I will sentence the defendants to the time they have already served on that charge.

On the attempted breaking and entering, I will sentence each of the defendants to six months in the County Jail, and thereafter one year probation.

All right.

MR. HUBBART: Your Honor, is that with credit for time served?

THE COURT: Give them credit for time they have already been in jail. All right.

(Thereupon the taking of the trial was concluded.)

[Reporter's Certificate to foregoing transcript omitted in printing]

IN THE CRIMINAL COURT OF RECORD,
In and for Dade County, State of Florida

OCTOBER TERM, 1968

68-6546

[Filed Nov. 25, 1968, J. F. McCracken, Clerk]

THE STATE OF FLORIDA

vs.

RAYMOND SMITH, MELVIN McCLAIN, AND JOHNNY L. BAKER

INFORMATION FOR I. VAGRANCY, II. ATTEMPTED BREAKING AND ENTERING A RAILROAD CAR

IN THE NAME AND BY THE AUTHORITY OF THE STATE OF FLORIDA:

ALFONSO C. SEPE, Assistant State Attorney of the Eleventh Judicial Circuit of Florida, prosecuting for the State of Florida, in the County of Dade, under oath, information makes that RAYMOND SMITH, MELVIN McCLAIN, and JOHNNY L. BAKER on the 13th day of November, 1968, in the County and State aforesaid, were then and there vagrants by wandering and strolling around from place to place without any lawful purpose

---

JFB:jhb
11/21/68

(A) Jail No. 28523-68 Bkd.: 11/13/68
(B) Jail No. 28524-68 Bkd.: 11/13/68
(C) Jail No. 28522-68 Bkd.: 11/13/68

Waived trial by jury with approval of court and consent of state.

/s/ Raymond Smith
/s/ Johnny Baker
/s/ Melvin McClain

or object, in violation of 856.02 Florida Statutes, Contrary to the form of the Statute in such cases made and provided, and against the peace and dignity of the State of Florida.

COUNT TWO.

And ALFONSO C. SEPE, Assistant State Attorney of the Eleventh Judicial Circuit of Florida, prosecuting for the State of Florida, in the County of Dade, under oath, further information makes that RAYMOND SMITH, MELVIN McCLAIN, and JOHNNY L. BAKER on the 13th day of November, 1968, in the County and State aforesaid, did unlawfully and feloniously attempt to break and enter a railroad car located at approximately the 2600 block of Northwest 71st Street, Dade County, Florida, property of SEABOARD AIR LINE RAILROAD COMPANY, a Corporation with intent to commit a felony therein, to-wit: Grand Larceny with intent to unlawfully take, steal and carry away money, goods and chattels of the value of more than ONE HUNDRED DOLLARS ($100.00), good and lawful money of the United States of America, property of SEABOARD AIR LINE RAILROAD COMPANY, a Corporation as custodian, by defendants breaking the seal and attempting to open door of railroad car, in violation of 776.04 and 810.04 Florida Statutes, contrary to the form of the Statute in such cases made and provided, and against the peace and dignity of the State of Florida.

/s/ Alfonso C. Sepe
Assistant State Attorney,
Eleventh Judicial Circuit
of Florida

STATE OF FLORIDA:
COUNTY OF DADE:,

Personally appeared before me, ALFONSO C. SEPE, Assistant State Attorney of the Eleventh Judicial Circuit of Florida, who, being first duly sworn, says that the allegations set forth in the within Information are based upon facts that have been sworn to as true, and which facts, if true, would constitute the offense therein charged.

/s/ Alfonso C. Sepe
Assistant State Attorney,
Eleventh Judicial Circuit
of Florida

SUBSCRIBED IN GOOD FAITH.

Sworn to and subscribed before me this 21st day of November, 1968.

J. F. McCracken, Clerk
Criminal Court of Record,
Dade County, Florida

By: /s/ [Illegible] , D.C.

Seal: Criminal Court of Record

Defendant RAYMOND SMITH, et al, arraigned in open Court on the within Information and pleaded

_____

_____
Deputy Clerk,
Criminal Court of Record,
Dade County, Florida

DIVISION "A"—December 3, 1968

#68-6546

STATE OF FLORIDA

vs.

RAYMOND SMITH — A
MELVIN McCLAIN — B

VAGRANCY

ATTEMPTED BREAKING AND ENTERING A RAILROAD CAR

Maynard A. Gross, Assistant State Attorney.

The Defendants, Raymond Smith and Melvin McClain in Proper Person.

Reported by June LaPoint,

The Court, upon the oral request of the Defendants, set Appearance Bond in the amount of $1,000.00 for the Defendant, Raymond Smith and $1,000.00 for the Defendant, Melvin McClain.

DIVISION "A"—December 5, 1968

#68-6546

STATE OF FLORIDA

vs.

RAYMOND SMITH — A
MELVIN MCCLAIN — B

VAGRANCY

ATTEMPTED BREAKING AND ENTERING A RAILROAD CAR

Maynard A. Gross, Assistant State Attorney.

Arthur B. Stark, Assistant Public Defender, Counsel for the Defendants.

Reported by June LaPoint.

The Court adjudged the Defendants, Raymond Smith, insolvent and appointed the Public Defender, as follows:

SEE BOOK 310, PAGE 229

The Court adjudged the Defendant, Melvin McClain, insolvent and appointed the Public Defender, as follows:

SEE BOOK 310, PAGE 230

Counsel for the Defendants orally presented a Motion to Dismiss Count One of the Information, which Motion the Court denied.

The Defendants, Raymond Smith and Melvin McClain, were arraigned in open Court by Maynard A. Gross, Assistant State Attorney, and each pleaded not guilty, waiving trial by jury.

Counsel for the Defendant orally presented a Motion for Bill of Particulars, which Motion the Court granted in part and denied in part.

Counsel for the Defendants orally presented a Motion to Suppress, upon which Motion the Court reserved ruling.

DIVISION "A"—December 18, 1968

#68-6546

STATE OF FLORIDA

vs.

RAYMOND SMITH — A
MELVIN McCLAIN — B

VAGRANCY

ATTEMPTED BREAKING AND ENTERING A RAILROAD CAR

Barbara D. Schwartz, Assistant State Attorney.

Phillip A. Hubbart, Assistant Public Defender, Counsel for the Defendant.

Reported by Teen Patterson.

Phillip A. Hubbart, Assistant Public Defender, Counsel for the Defendant, orally presented a Motion to Dismiss Count One of the Information, which Motion the Court denied.

All the Witnesses and the Defendant were sworn.

State's Witnesses:

1. Wallace Corbin

The Court admitted into evidence the following items:

Corporation Certificate _____ State's Exhibit #1

Lock Seal _____ State's Exhibit #2

State Rests.

Counsel for the Defendant orally presented a Motion for Judgment of Acquittal, which Motion the Court denied.

Defendant's Witnesses:

1. Raymond Smith, Defendant "A"
2. Melvin McClain, Defendant "B"

Defendant Rests.

Counsel for the Defendant orally renewed his Motion for Judgment of Acquittal, which Motion the Court denied.

The Court adjudged the Defendant, Raymond Smith, guilty, and sentenced him, as follows:

SEE BOOK 312, PAGE 239

The Court placed the Defendant, Raymond Smith, on probation at the expiration of sentence, as follows:

SEE BOOK 312, PAGES 249 and 250

The Court adjudged the Defendant, Melvin McClain, guilty and sentenced him, as follows:

SEE BOOK 312, PAGE 240

The Court placed the Defendant, Melvin McClain, on probation, at the expiration of sentence, fixing the terms and conditions thereof.

BENCH DOCKET

CRIMINAL COURT OF RECORD
DADE COUNTY, FLORIDA

STATE OF FLORIDA

vs.

RAYMOND SMITH, DEFENDANT

Charge: Vagrancy, etc. Case No. 68-6546-A

JUDGMENT

It appearing unto this Court that you, Raymond Smith have been regularly tried and convicted of Vagrancy; Unlawfully and feloniously Attempting to Break and Enter a Railroad Car

IT IS THEREFORE THE JUDGMENT of the law and it is hereby adjudged that you are and stand convicted of the offenses as above set forth.

What have you to say why sentence should not now be imposed upon you?

Saying nothing that could influence the Court in its decision.

SENTENCE

IT IS FURTHER CONSIDERED, ORDERED AND ADJUDGED that as to Count one of the Information, you be imprisoned by confinement at hard labor in the Dade County Jail for a term of Thirty six (36) days sentence to begin from date of incarceration.

IT IS FURTHER CONSIDERED, ORDERED AND ADJUDGED that as to Count Two of the Information, you be imprisoned by confinement at hard labor in the Dade County Jail for a term of Six (6) months, sentence to begin from date of incarceration.

DONE AND ORDERED in open Court in Miami, Dade County, Florida this 18 day of December, A.D. 1968.

By /s/ Jack M. Turner
Judge
Div. A 1

Filed this 18 day of December A.D. 1968 and recorded in Criminal Court of Record, Minutes No. 312 on Page 239.

J. F. McCracken, Clerk

By Sara Baldwin, Deputy

BENCH DOCKET

CRIMINAL COURT OF RECORD
DADE COUNTY, FLORIDA

STATE OF FLORIDA

vs.

MELVIN McCLAIN, DEFENDANT

Charge: Vagrancy, etc. Case No. 68-6546-B

JUDGMENT

It appearing unto this Court that you, Melvin McClain have been regularly tried and convicted of Vagrancy; Unlawfully and feloniously Attempting to Break and Enter a Railroad Car

IT IS THEREFORE THE JUDGMENT of the law and it is hereby adjudged that you are and stand convicted of the offenses as above set forth.

What have you to say why sentence should not now be imposed upon you?

Saying nothing that could influence the Court in its decision.

SENTENCE

IT IS FURTHER CONSIDERED, ORDERED AND ADJUDGED that as to Count one of the Information, you be imprisoned by confinement at hard labor in the Dade County Jail for a term of Thirty six (36) days sentence to begin from date of incarceration.

IT IS FURTHER CONSIDERED, ORDERED AND ADJUDGED that as to Count Two of the Information, you be imprisoned by confinement at hard labor in the Dade County Jail for a term of Six (6) months, sentence to begin from date of incarceration.

DONE AND ORDERED in open Court in Miami, Dade County, Florida this 18 day of December, A.D. 1968.

By /s/ Jack M. Turner
Judge
Div. A 1

Filed this 18 day of December A.D. 1968 and recorded in Criminal Court of Record, Minutes No. 312 On Page 240.

J. F. McCracken, Clerk

By Sara Baldwin, Deputy

IN THE CRIMINAL COURT OF RECORD
IN AND FOR DADE COUNTY, FLORIDA

Case No. 68-6546

[File Endorsement Omitted]

THE STATE OF FLORIDA, PLAINTIFF

vs.

RAYMOND SMITH AND MELVIN MCCLAIN, DEFENDANTS

ORDER—filed December 24, 1968

THIS CAUSE having come on for a hearing on the defendants' oral Motion to Dismiss Count I of the Information filed in this cause, and the Court having heard legal arguments from the parties and being fully advised on the premises, and the Court having previously ruled orally in open court that said Motion to Dismiss is denied and the Court desiring to incorporate said oral ruling into a written Order,

the Court finds that Fla. Stat. 856.02, upon which the Information in Count I in this cause is predicated, is constitutional within the meaning of the due process clause of the Fourteenth Amendment to the United States Constitution, it is hereby

ORDERED AND ADJUDGED that defendants' oral Motion to Dismiss Count I of the Information is hereby denied nunc pro tunc.

/s/ Jack M. Turner
JACK TURNER,
Judge of the Criminal
Court of Record, in and
for Dade County, Florida

IN THE CRIMINAL COURT OF RECORD
IN AND FOR DADE COUNTY, FLORIDA

Case No. 68-6546

[File Endorsement Omitted]

THE STATE OF FLORIDA, PLAINTIFF

vs.

RAYMOND SMITH AND MELVIN MCCLAIN, DEFENDANTS

ORDER—filed December 24, 1968

THIS CAUSE, having come on for a hearing on the defendants' Motion for a New Trial and the Court having heard legal argument from the parties in this cause, and the Court being fully advised on the premises,

the Court finds that Fla. Stat. 856.02, upon which the defendants were prosecuted on Count I of the Information filed in this cause, is constitutional within the meaning of the due process clause of the Fourteenth Amendment to the United States Constitution, it is hereby

ORDERED AND ADJUDGED that the defendants' Motion for a New Trial is hereby denied.

DONE AND ORDERED in Chambers, Miami, Florida, this 24th day of January, 1968.

/s/ Jack M. Turner
JACK TURNER,
Judge of the Criminal
Court of Record, in and
for Dade County, Florida

IN THE CRIMINAL COURT OF RECORD
IN AND FOR DADE COUNTY, FLORIDA

Case No. 68-6546

THE STATE OF FLORIDA, PLAINTIFF

vs.

RAYMOND SMITH AND MELVIN McCLAIN, DEFENDANTS

MOTION FOR NEW TRIAL—filed December 26, 1968

COMES NOW the defendants, RAYMOND SMITH and MELVIN McCLAIN, by and through their undersigned attorney, ROBERT L. KOEPPEL, Public Defender for the 11th Judicial Circuit of Florida, and files this their Motion for New Trial in the above-styled cause and would state as grounds the following:

1. The Court erred in denying the defendants' oral Motion to Dismiss Count I of the Information in this cause because this Count in the Information was predicated on a State statute (Fla. Stat. 856.02), which is so broad and vague in nature that it violates the due process clause of the Fourteenth Amendment of the United States Constitution.

2. The Court erred in denying the defendants' oral Motion to Dismiss Count I of the Information since the charge contained in Count I of the Information is so broad and vague in nature that it violates the due process clause of the Fourteenth Amendment of the United States Constitution.

3. The defendants' conviction for Vagrancy under Fla. Stat. 856.02 is void since said statute upon which the defendants' conviction is unconstitutional within the meaning of the due process clause of the Fourteenth Amendment to the United States Constitution.

Respectfully submitted,

ROBERT L. KOEPPEL
Public Defender
11th Judicial Circuit
of Florida

By /s/ Phillip A. Hubbart
PHILLIP A. HUBBART

[Certificate of Service (omitted in printing)]

IN THE CRIMINAL COURT OF RECORD
IN AND FOR DADE COUNTY, FLORIDA

Case No. 68-6546

THE STATE OF FLORIDA

vs.

RAYMOND SMITH AND MELVIN McCLAIN, DEFENDANTS

NOTICE OF APPEAL—filed January 14, 1969

The Defendants, Raymond Smith and Melvin McClain, takes and enters his appeal to the Florida Supreme Court, to review the judgment and sentence of the Criminal Court of Record, in and for Dade County, Florida, bearing date the 18th day of December, A.D., 1968, and rendered on the 24th day of December, A.D., 1968, as to Count I of the Information.

The nature of the order appealed from is a final judgment of conviction and sentence.

All parties to said cause are called upon to take notice of the entry of this appeal.

DATED this 14th day of January, A.D., 1969.

ROBERT L. KOEPPEL
Public Defender
11th Judicial Circuit
of Florida

By /s/ Phillip A. Hubbart
PHILLIP A. HUBBART
Assistant Public Defender

[Certificate of Service (omitted in printing)]

IN THE CRIMINAL COURT OF RECORD
IN AND FOR DADE COUNTY, FLORIDA

Case No. 68-6546

[File Endorsement Omitted]

THE STATE OF FLORIDA, PLAINTIFF

vs.

RAYMOND SMITH AND MELVIN GRAHAM McCLAIN,
DEFENDANTS

ASSIGNMENTS OF ERROR—filed March 4, 1969

COMES NOW the defendants, RAYMOND SMITH and MELVIN GRAHAM McCLAIN, by and through their undersigned attorney, ROBERT L. KOEPPEL, Public Defender for the Eleventh Judicial Circuit of Florida, and respectfully filed this his Assignments of Error intended to be relied upon in the Supreme Court of Florida for reversal of judgment and sentence entered in the above-styled cause.

1. The lower court erred in denying the defendants' oral motion to dismiss Count I of the Information filed against the defendants in this cause on the ground that Florida Statute 856.02 proscribing "wandering and strolling around from place to place without any lawful purpose or object," upon which Count I of the Information was predicated, states no ascertainable standard of criminal conduct, is constitutionally void for vagueness, and accordingly is unconstitutional under the due process clause of the Fourteenth Amendment to the United States Constitution.

2. The lower court erred in denying the defendants' motion for a new trial on the ground that the defendants' conviction herein is predicated on an unconstitutional vagrancy statute, to wit: The "wandering" section of Florida Statute 856.02 which proscribes "wandering and strolling around from place to place without any lawful purpose or object." This section of Florida

Statute 856.02 proscribes no ascertainable standard of criminal conduct, is uncontitutionally void for vagueness and accordingly violates the due process clause of the Fourteenth Amendment to the United States Constitution.

Respectfully submitted,

ROBERT L. KOEPPEL
Public Defender
11th Judicial Circuit

By /s/ Phillip A. Hubbart
PHILLIP A. HUBBART
Assistant Public Defender

[Certificate of Service (omitted in printing).]

[Clerk's Certificate to foregoing transcript omitted in printing]

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING PETITION AND, IF FILED, DETERMINED

IN THE SUPREME COURT OF FLORIDA
JULY TERM A. D. 1970

Case No. 38,210

RAYMOND SMITH, ET AL., APPELLANTS

—*vs*—

STATE OF FLORIDA, APPELLEE

OPINION Filed September 16, 1970

An Appeal from the Criminal Court of Record, Dade County, Jack M. Turner, Judge

Robert L. Koeppel, Public Defender and

Phillip A. Hubbart, Assistant Public Defender, for Appellant

Earl Faircloth, Attorney General and J. Christian Meffert, Assistant Attorney General, for Appellee

ROBERTS, J.

This cause is before the court on a direct appeal from a judgment convicting the defendants-appellants of the offense of vagrancy "by wandering and strolling around from place to place without any lawful purpose or object," as denounced by § 856.02, Florida Statutes. The trial court upheld the statute as against an attack made in a motion to dismiss and again in a motion for a new trial filed by the defendants on the ground that the offense charged was so broad and vague in nature as to violate the due process clause of the federal and state constitutions. We have jurisdiction of the appeal under Section 4, Article V, of the Constitution. *Milliken* v. *State*, Fla. 1961, 131 So.2d 889.

The attack here made upon the particular provision of the vagrancy statute alleged to have been violated by

the appellants is substantially the same as that made in *Johnson* v. *State*, Fla. 1967, 202 So.2d 852. In that case the court was unanimous in holding that the provision of the statute here in question was not susceptible to the charge of vagueness there made against it. In the well considered concurring opinion filed by Chief Justice Ervin it was stated that our statute

> ". . . appears to be of the genre of vagrancy laws which have long been upheld as necessary regulations to deter vagabondage and prevent crimes and the imposition upon society of able bodied irresponsibles who of their own volition become burdens upon others and particularly on their families for support."

It was held also that the statute meets the tests of certainty outlined in State ex rel. *Lee* v. *Buchanan*, Fla. 1966, 191 So.2d 33; *Carter* v. *State*, Fla. 1963, 155 So. 2d 787; and *Tracey* v. *State*, Fla. 1961, 130 So.2d 605. The decision in *Johnson* was reversed by the United States Supreme Court because of a lack of evidence to support the judgment of conviction, without reaching the question of the constitutionality of the statute. See *Johnson* v. *Florida*, 391 U.S. 596, 20 L.Ed.2d 838, 88 S.Ct. 1713.

We have reconsidered our decision in the *Johnson* case in the light of the decisions of other courts cited by appellants as well as the decision of the United States District Court for the Southern District of Florida in *Lazarus* v. *Faircloth*, 301 F.Supp. 266 (June 9, 1969), declaring the entire vagrancy statute, Section 856.02, to be invalid. The *Lazarus* decision is now on direct appeal to the United States Supreme Court. We find nothing in these decisions to persuade us to recede from our previous conclusion respecting the validity of Section 856.02.

Accordingly, the judgment appealed from should be and it is hereby

Affirmed.

ERVIN, C.J., THORNAL, CARLTON and ADKINS, JJ., concur
BOYD, J., dissents with opinion
DREW, J., dissents and concurs with BOYD, J.

BOYD, J., DISSENTING:

I must dissent to the majority opinion. The statute in question was designed long ago to prevent idle and irresponsible persons from living on the income of those who earned their living by the sweat of their brows.

In our time a large portion of our population retires at an early age and is encouraged to relax in the Florida sunshine. Hundreds of thousands of tourists visit Florida. They should not be required to prove they have a lawful purpose. It would be a contravention of our basic understanding of constitutional rights to jail persons in this State for "wandering around without having a lawful purpose." Specifically the requirement that persons who wander around must have a lawful purpose is too vague to notify the public as to what standard of conduct the State requires. It seems logical to conclude that to prove an accused person had no lawful purpose the State must show the defendant was engaging in an unlawful purpose. The burden must be upon the State to prove one is doing an unlawful act.

Vagrancy statutes have been widely used by police authorities to hold people remotely suspected of crime while investigations were conducted. Modern interpretations of individual civil rights under state and federal constitutions clearly prohibit this now. If one is engaging in unlawful conduct the State should charge the person with violating a specific law. There is certainly no shortage of criminal laws.

DREW, J., concurs

SUPREME COURT OF THE UNITED STATES

No. 6294, October Term, 1970

RAYMOND SMITH and MELVIN MCCLAIN, PETITIONERS

v.

FLORIDA

On petition for writ of Certiorari to the Supreme Court of the State of Florida.

On consideration of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

June 14, 1971

☆ U. S. GOVERNMENT PRINTING OFFICE: 1971 440020. 55

IN THE

Supreme Court of the United States

No. 70-5055

RAYMOND SMITH and MELVIN McCLAIN,

Petitioners,

v.

STATE OF FLORIDA,

Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF FLORIDA

BRIEF FOR THE PETITIONERS

PHILLIP A. HUBBART
Public Defender
Eleventh Judicial Circuit of
Florida
1351 Northwest 12 Street
Miami, Florida 33125
Attorney for Petitioners

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IN THE SUPREME COURT OF THE UNITED STATES

No. 70-5055

RAYMOND SMITH and MELVIN McCLAIN,

Petitioners,

v.

STATE OF FLORIDA,

Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF FLORIDA

BRIEF FOR THE PETITIONERS

OPINION BELOW

The opinion of The Supreme Court of Florida is reported at 239 So. 2d 250 (App. 42-44).

JURISDICTION

The judgment and opinion of The Supreme Court of Florida was entered on September 16, 1970. This petition for a writ of certiorari is timely filed within 90 days of that

date. This Court's jurisdiction is invoked under *28 U.S.C. Sec. 1257(3).*

QUESTION PRESENTED

Is *Fla. Stat. 856.02*, which denounces and punishes as "vagrants" all "persons wandering or strolling around from place to place without any lawful purpose or object," a vague and overbroad criminal statute which fails to proscribe an ascertainable standard of criminal conduct thereby violating the Due Process Clause of the Fourteenth Amendment to the United States Constitution?

STATUTE INVOLVED

Fla. Stat. Sec. 856.02, 22A F.S.A. Sec. 856.02 (1965) provides as follows:

> "856.02 Vagrants.
>
> Rogues and vagabonds, idle or dissolute persons who go about begging, common gamblers, persons who use juggling, or unlawful games or plays, common pipers and fiddlers, common drunkards, common night walkers, thieves, pilferers, traders in stolen property, lewd, wanton and lascivious persons, keepers of gambling places, common railers and brawlers, persons who neglect their calling or employment, or are without reasonably continuous employment or regular income and who have not sufficient property to sustain them, and misspend what they earn without providing for themselves or the support of their families, *persons wandering or strolling around from place to place without any lawful purpose or object*, habitual loafers, idle and disorderly persons, persons neglecting all lawful business and habitually spending their time by frequenting houses of ill fame, gaming houses or tippling shops, persons able to work but habitually living upon the earnings of their wives or minor children, and all able bodied male persons over the age of

eighteen years who are without means of support and remain in idleness, *shall be deemed vagrants, and upon conviction shall be subject to the penalty provided in Sec. 856.03.*" (Emphasis added.)

STATEMENT OF THE CASE

On November 25, 1968; the Petitioners were charged in a two-count information filed in the Criminal Court of Record in and for Dade County, Florida (App. 24). Count I of the Information charged the Petitioners as follows:

> "IN THE NAME AND BY THE AUTHORITY OF THE STATE OF FLORIDA: ALFONSO C. SEPE, Assistant State Attorney of the Eleventh Judicial Circuit of Florida, prosecuting for the State of Florida, in the County of Dade, under oath, information makes that RAYMOND SMITH, MELVIN McCLAIN, and JOHNNY L. BAKER on the 13th day of November, 1968, in the County and State aforesaid, were then and there vagrants by wandering and strolling around from place to place without any lawful purpose or object, in violation of 856.02 Fla. Stat., contrary to the form of the Statute in such cases made and provided, and against the peace and dignity of the State of Florida." (App. 24.)

On December 5, 1968, the Petitioners entered a plea of not guilty and waived trial by jury (App. 28).

On December 18, 1968, the cause came on for trial before the Honorable Jack M. Turner, Judge of the Criminal Court of Record in and for Dade County, Florida (App. 1). Prior to the time the witnesses were sworn, Petitioners' counsel was permitted by the trial court to make an oral motion to dismiss count I of the information, to wit:

> "MRS. SCHWARTZ: Raymond Smith and Melvin Graham McClain.
>
> MR. HUBBART: Your Honor, at this time I would like permission to dictate a motion to dismiss into the record with respect to Count I.

THE COURT: All right.

MR. HUBBART: Comes now the defendants, Raymond Smith and Melvin Graham McClain, and respectfully moves this Honorable Court to dismiss Count I of the Information filed in this case on the ground that Fla. Stat. 856.02 is void for vagueness under the Fourteenth Amendment to the United States Constitution; particularly that section of Florida Statute 856.02, which proscribes, "wandering and strolling around from place to place without a lawful object."

That particular section of the statute I maintain is a violation of the Due Process Clause of the Fourteenth Amendment because it is void for vagueness; it has no ascertainable standard of guilt stated therein, and under the United States Supreme Court decision of Lanzetta v. New Jersey, any state criminal statute which fails to state an ascertainable standard of criminal guilt in a criminal statute is void for vagueness and is unconstitutional.

Accordingly, the Count, Count I, which is based on that particular section of the statutes, we submit should be dismissed in this cause.

THE COURT: All right. I will deny the motion. I find that the statute is crystal clear.

All right, let's swear the witnesses." (App. 3.)

On December 24, 1968, Judge Turner entered a written order, nunc pro tunc, denying the Petitioners' oral motion to dismiss, to wit:

"THIS CAUSE, having come on for a hearing on the defendants' oral motion to dismiss Count I of the Information filed in this cause, and the Court having heard legal arguments from the parties and being fully advised on the premises, and the Court having previously ruled orally in open Court that said motion to dismiss is denied and the Court desiring to incorporate said oral ruling into a written Order, the Court finds that Fla. Stat. 856.02, upon which

the Information in Count I in this cause is predicated, is constitutional within the meaning of the Due Process Clause of the Fourteenth Amendment to the United States Constitution, it is hereby

ORDERED AND ADJUDGED that defendants' oral motion to dismiss Count I of the Information is hereby denied nunc pro tunc." (App. 35.)

On December 18, 1968, the cause proceeded to trial and the Petitioners were found guilty as charged in count I of the information (App. 20). On December 18, 1968, the trial court sentenced the Petitioners on Count I of the Information to 36 days in the County Jail (App. 31).

On December 26, 1968, the Petitioners filed a written motion for new trial again attacking the Wanderer Section of *Fla. Stat. Sec. 856.02, 22A F.S.A. Sec. 856.02* (1965), on the ground that it was void for vagueness and overbroadness in violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution (App. 37-38).

On December 24, 1968, the trial court entered a written order denying the motion for new trial, which order states as follows:

"THIS CAUSE, having come on for a hearing on the defendants' motion for a new trial and the Court having heard legal argument from the parties in this cause, and the Court being fully advised on the premises,

the Court finds that Fla. Stat. 856.02, upon which the defendants were prosecuted on Count I of the Information filed in this cause, is constitutional within the meaning of the Due Process Clause of the Fourteenth Amendment to the United States Constitution, it is hereby

ORDERED AND ADJUDGED that the defendants' motion for a new trial is hereby denied." (App. 36.)

On January 14, 1969, the Petitioners filed a notice of appeal to review their convictions in the Supreme Court of Florida (App. 39). On March 4, 1969, the Petitioners filed assignments of error on appeal which were relied upon before the Supreme Court of Florida (App. 40-41). In the assignments of error, the Petitioners again attacked the constitutionality of the Wanderer Section of *Fla. Stat. Sec. 856.02, 22A F.S.A. Sec. 856.02* (1956) as being unconstitutionally void on its face for vagueness under the Due Process Clause of the Fourteenth Amendment to the United States Constitution (App. 40-41).

On September 16, 1970, the Supreme Court of Florida in a split decision (5-2) affirmed the Petitioners' convictions and specifically upheld the constitutional validity of *Fla. Stat. Sec. 856.02, 22A F.S.A. Sec. 856.02* (1965). *Smith v. State*, 239 So. 2d 250 (Fla. 1970) (App. 42-43). Justices Boyd and Drew dissented finding the statute too vague and broad to withstand constitutional tests (App. 44).

On December 14, 1970, the Petitioners filed a Petition for a Writ of Certiorari under *28 U.S.C. Sec. 1257(3)* to review the decision of the Supreme Court of Florida. On June 14, 1971, this Court granted certiorari. *Smith v. Florida*, 91 S. Ct. 2234 (1971) (App. 45). Also Petitioners' motions to proceed in forma pauperis were granted.

SUMMARY OF ARGUMENT

I. The Wanderer Section of *Fla. Stat. Sec. 856.02, 22A F.S.A. Sec. 856.02* (1965), as construed by the Florida Courts, punishes as "vagrants" all "persons wandering or strolling around from place to place" (i.e., by any mode of travel whether on foot or in a vehicle, *Hanks v. State*, 195 So. 2d 49, 51 (3d D.C.A. Fla. 1966), but having no application to persons sitting on bus benches, *Johnson v. State*, 216 So. 2d 7 (Fla. 1968), on remand from *Johnson v. Florida*, 391 U.S. 596 (1968)), "without any lawful purpose or object" (i.e., "without good or sufficient reason," *Hanks v.*

State, 195 So. 2d 49, 51 (3d D.C.A. Fla. 1966)), providing such persons "are vagrants of their own volition and choice," *Headley v. Selkowitz*, 171 So. 2d 268, 270 (Fla. 1965). The statute has withstood constitutional attack in the Florida courts as being derived from " 'the genre of vagrancy laws which have long been upheld as necessary regulations to deter vagabondage and prevent crimes and the imposition upon society of ablebodied irresponsibles who of their own volition become burdens upon others and particularly on their families for support.' " *Smith v. State*, 239 So. 2d 250, 251 (Fla. 1970) (App. 43).

The statute is "distinctly Elizabethan" and "seems to have been selected at random from the Statute of Elizabeth as it was enacted in 1597-98." Sherry, "Vagrants, Rogues and Vagabonds—Old Concepts in Need of Revision," *48 Cal. L. Rev.* 557, 560 (1960). It is based on a long line of rather barbaric English vagrancy acts which constituted some of the most oppressive pieces of class legislation ever enacted by the English Parliament. *Hicks v. District of Columbia*, 383 U.S. 252 (1966) (Douglas, J. dissenting).

This Court has consistently held that in reviewing the constitutionality of a state statute it is bound by the state courts' construction of the statute. *Winters v. New York*, 333 U.S. 507, 514 (1948); *Guaranty Trust Co. v. Blodgett*, 287 U.S. 509, 513 (1933).

II. The Wanderer Section of *Fla. Stat. Sec. 856.02, 22A F.S.A. Sec. 856.02* (1965), as construed by the Florida courts, is unconstitutional on its face in violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution for the following two reasons:

A. The statute is designedly so vague that a person of common intelligence cannot know what is forbidden, thereby inviting arbitrary and discriminatory enforcement of the statute by state authorities. "(A) statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates

the first essential of due process of law." *Connally v. General Construction Co.*, 269 U.S. 385, 391 (1926). Such a vague criminal statute is unconstitutional on its face in violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution regardless of the details of the offense charged. *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939).

The statute under review is a purposely open-ended catch-all which does not prohibit overt acts of criminal conduct, but instead prohibits a vaguely described activity or way of life which is thought to lead to crime. The Supreme Court of Florida stated in the decision below that the statute was designed "'to deter vagabondage and prevent crime. . . .'" *Smith v. State*, 239 So. 2d 250, 251 (Fla. 1970) (App. 43). The Attorney General of Florida also so states. Response to Petition for Writ of Certiorari to the Supreme Court of Florida 6-7.

The statutory terms "without any lawful purpose or object," as construed to mean "without good or sufficient reason" are most vague and indefinite for the following reasons: (1) What may be a "good or sufficient reason" for traveling to one person may not appear so to another; (2) The statute gives no notice as to whether aimless "wandering or strolling" is "without good or sufficient reason." If so, many of Florida's tourists who wander or stroll aimlessly on the beaches and resort areas are subject to arrest. *Territory of Hawaii v. Anduha*, 48 F.2d 171 (9th Cir. 1931); (3) The statute gives no notice as to whether a person is bound to give a "good or sufficient reason" for his wandering or strolling if stopped by an inquiring police officer; (4) The statute gives no notice as to whether the police officer (or indeed who, if anyone) must be satisfied that the reason given for traveling is "good or sufficient."

Vagrancy laws are purposely designed to be vague and indefinite so that the police may arrest persons who are "undesirable" but have committed no overt criminal act. *Winters v. New York*, 333 U.S. 507, 540 (1948) (Frank-

furter, J. dissenting). Such vagrancy-type laws have been held void for vagueness in this Court. *Lanzetta v. New Jersey*, 306 U.S. 451 (1939); *Coates v. City of Cincinnati*, ___ U.S. ___, 91 S. Ct. 1686 (1971). Other vagrancy laws, many quite similar to Florida's act, have been similarly held unconstitutional by other Courts. Cf. *Decker v. Fillis*, 306 F. Supp. 613 (D. Utah 1969); *Ricks v. District of Columbia*, 414 F.2d 1097, 1107 (D.C. Cir. 1968). These laws must be distinguished from laws using relatively imprecise language dealing with a rather limited range of activity, particularly in the industrial and economic regulation area. E.g., *Boyce Motor Lines Inc. v. United States*, 342 U.S. 337 (1952); *United States v. National Dairy Products*, 372 U.S. 29 (1963). Moreover, the Florida Act, unlike other legislation which has been upheld, does not even purport to deal with problems in modern life.

Since the statute is so vague, it invites arbitrary and discriminatory enforcement of its provisions by state authorities. *Territory of Hawaii v. Anduha*, 48 F.2d 171 (9th Cir. 1931). It is for this reason that vague criminal laws have long been condemned by this Court. E.g., *Herndon v. Lowry*, 301 U.S. 242, 263 (1937); *N.A.A.C.P. v. Button*, 371 U.S. 415, 433 (1963).

B. The statute is designedly so broad that it abridges rights protected by the United States Constitution, to wit: the right to be free from unreasonable searches and seizures and the right to travel. Such laws are unconstitutional on their face regardless of the details of the offense charged. E.g., *Thornhill v. Alabama*, 310 U.S. 88, 96-98 (1940); *Coates v. City of Cincinnati*, ___ U.S. ___, 91 S. Ct. 1686 (1971).

1. The right to be free from unreasonable searches and seizures is guaranteed against invasion by state authorities by the Fourth Amendment and the Due Process Clause of the Fourteenth Amendment to the United States Constitution. *Mapp v. Ohio*, 367 U.S. 643 (1961). Unreasonable arrests and seizures of the person based on mere suspicion

are forbidden by these constitutional guarantees. E.g., *Beck v. Ohio*, 379 U.S. 89 (1964); *Henry v. United States*, 361 U.S. 98 (1959). Yet the statute in question not only authorizes such arrests and seizures, but is designed to do so. *Winters v. New York*, 333 U.S. 507, 540 (Frankfurter, J. dissenting); *Ricks v. District of Columbia*, 414 F.2d 1097, 1108-1109 (D.C. Cir. 1968). As such, the statute overreaches this federally guaranteed constitutional right.

2. The right to travel is an implicit part of the freedom guaranteed by the Constitution to all persons. *United States v. Guest*, 383 U.S. 745, 757 (1966) and cases collected. The statute overreaches this right by prohibiting all travel "without good or sufficient reason." These broad and sweeping restrictions "certainly chill the liberty of lawful movement," *Decker v. Fillis*, 306 F. Supp. 613, 617 (D. Utah 1969), by subjecting it to a vague and uncertain standard.

ARGUMENT

I. The Wanderer Section of *Fla. Stat. Sec. 856.02, 22A F.S.A. Sec. 856.02* (1965), as Construed by the Florida Courts, Punishes as "Vagrants" All "Persons Wandering or Strolling Around from Place to Place" (i.e., by Any Mode of Travel Whether on Foot or in a Vehicle, But Having No Application to Persons Sitting on a Bus Bench), "Without Any Lawful Purpose or Object" (i.e., "Without Good or Sufficient Reason"), Providing Such Persons "Are Vagrants of Their Own Volition and Choice"; the Statute Has Withstood Constitutional Attack in the Florida Courts as Being Derived from "'the Genre of Vagrancy Laws Which Have Long Been Upheld as Necessary Regulations To Deter Vagabondage and Prevent Crimes and the Imposition upon Society of Able Bodied Irresponsibles Who of Their Own Volition Become Burdens upon Others and Particularly on Their Families for Support.'"

In the instant case, the Petitioners were charged by information in the Criminal Court of Record in and for Dade County, Florida, with violating the Wanderer Section of *Fla. Stat. Sec. 856.02, 22A F.S.A. Sec. 856.02* (1965), which provides that all "persons wandering or strolling around from place to place without any lawful purpose or object . . . shall be deemed vagrants . . .," the punishment for which is provided in *Fla. Stat. Sec. 856.03, 22A F.S.A. Sec. 856.03* (1965), as a fine not exceeding $250.00 or imprisonment not exceeding six (6) months.

The Petitioners attacked the constitutionality of the wanderer section of the Florida vagrancy act by way of a motion to dismiss the information, a motion for new trial, and in assignments of error in the courts below. Specifically, Petitioners contended that the statute upon which the charge was based was unconstitutionally void

for vagueness and overbroadness under the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

Judge Jack Turner of the Criminal Court of Record in and for Dade County, Florida, denied Petitioners motion to dismiss the information, found the Petitioners guilty as charged, sentenced the Petitioners to time already served in jail, and denied Petitioners' motion for new trial. Judge Turner announced in open court that the statute in question was "crystal clear" (App. 3). Later, Judge Turner entered two written orders specifically finding that the statute under review was constitutional within the meaning of the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

The Supreme Court of Florida affirmed the conviction in a split (5-2) decision and specifically upheld the constitutionality of the statute, *Smith v. State*, 239 So. 2d 250 (1970). This Court has granted certiorari, 91 S. Ct. 2234 (1971), on the sole question of whether the Wanderer Section of *Fla. Stat. Sec. 856.02, 22A F.S.A. Sec. 856.02* (1965) is unconstitutionally void on its face for being too vague and overbroad in violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

This Court has consistently held that in reviewing the constitutionality of a state statute it is bound by the state courts' construction of the statute. *Winters v. New York*, 333 U.S. 507, 514 (1948); *Guaranty Trust Co. v. Blodgett*, 287 U.S. 509, 513 (1933). Accordingly, the Florida courts' construction of the Wanderer Section of *Fla. Stat. Sec. 856.02, 22A F.S.A. Sec. 856.02* (1965) must be examined in determining whether the statute is constitutionally valid.

The Supreme Court of Florida in its opinion rendered in the instant case construed the statute to be derived from common law vagrancy legislation and to fall within its historical purposes. The Court stated:

"The attack here made upon the particular provision of the vagrancy statute alleged to have been violated by the appellants is substantially the same as that made in Johnson v. State, Fla. 1967, 202 So. 2d 852. In that case the court was unanimous in holding that the provision of the statute here in question was not susceptible to the charge of vagueness there made against it. In the well considered concurring opinion filed by Chief Justice Ervin it was stated that *our statute*

"'. . . *appears to be of the genre of vagrancy laws which have long been upheld as necessary regulations to deter vagabondage and prevent crimes and the imposition upon society of able bodied irresponsibles who of their own volition become burdens upon others and particularly on their families for support.*'" *Smith v. State*, 239 So. 2d 250, 251 (Fla. 1970). (Emphasis added.)

In *Johnson v. State*, 202 So. 2d 852 (Fla. 1967) (Ervin, J. agreeing in part and dissenting in part), cited with approval above by the Supreme Court of Florida, it was further stated:

"Our statute (Fla. Stat. Sec. 856.02, 22A F.S.A. Sec. 856 (1965)), which was derived from the early English law, refers to two main categories of vagrants, viz., (1) able bodied beggars, common gamblers, drunkards, railers and brawlers, thieves, pilferers, traders in stolen property, lewd persons and keepers of gambling places, who are denounced as such regardless of their financial status, and (2) able bodied persons who are habitual idlers, loafers, 'hoboes', who neglect their lawful business, if any, stroll and wander from place to place without lawful purpose or object and who are without means of support or reasonably continuous employment or regular income." *Id.* at 854-855.

Since the Florida Courts have construed *Fla. Stat. Sec. 856.02, 22A F.S.A. Sec. 856.02*, (1965), to be based on the common law of vagrancy, it is most instructive to survey in context "'the genre of vagrancy laws,'" *Smith v. State*, 239

So. 2d at 251, upon which the Florida statute is based and from which it derives its meaning.

The English vagrancy laws dating back to the fourteenth century are rather barbaric and constitute some of the most oppressive pieces of class legislation ever enacted by the English Parliament. *Hicks v. District of Columbia*, 383 U.S. 252 (1966) (Douglas, J. dissenting). The purpose of these laws was to prevent people, who were freed from the feudal estates by the breakdown of the feudal system, from wandering, to keep them in their own parish where they were forced to work, and cared for, if necessary. Those who wandered from place to place were severely punished. Such people were feared and regarded as criminals. *Ledwith v. Roberts* (1937), 1 K.B. 232, 271. "Vagrancy may be regarded to a great extent as forming the criminal aspect of the poor laws . . ." *3 Stephen, History of Criminal Law of England* 266 (1883) (also see pp. 274-275).

The first of the vagrancy statutes was apparently the *Statute of Laborers* (23 Edw. 3; 25 Edw. 3, St. 1) passed in 1349 and 1350. According to Stephen, "first came serfdom, next came the Statute of Laborers which practically confined the laboring population to stated places of abode and requiring them to work at specified rates of pay. Wandering or vagrancy thus became a crime." *3 Stephen, History of Criminal Law of England* 267 (1883). The next vagrancy act was *7 Rich. 2, c. 2* (1383) which prohibited "wandering from place to place," as does *Fla. Stat. Sec. 856.02, 22A F.S.A. Sec. 856.02* (1965).

Punishments for wandering were extremely severe and cruel. *II Henry 7*, c. 2 (1494) provided that the vagrants be placed in the stocks for three days and three nights and fed bread and water. *27 Henry 8*, c. 2 (1535) provided that on the first offense the vagrant be whipped and sent back to the place where he was born or where he last dwelled three years ago, that on the second offense the vagrant would lose part of his right ear, and that on the third offense the vagrant would be executed. The *Slavery*

Act, 1 Edw. 1, c. 3 (1547) provided that vagrants would be made slaves for two years, branded on the shoulder or cheek, wear a ring around their necks, arms and legs, fed bread, water and refuse meat, and compelled to work by beating and chaining. If he escaped while in slavery, the vagrant upon recapture was made a slave for life. If he escaped a second time, he was executed upon recapture.

In 1597, Parliament passed an Act which settled the vagrancy law for some time and served as a model for the Florida Act. The *Act of 39 Eliz.*, c. 4 (1597) denounced as vagrants the following:

> "All persons calling themselves scholars going about begging, all seafaring men pretending losses of their ships and goods at sea; all idle persons going about either begging or using any subtle craft, or unlawful games and plays, or feigning to have knowledge of physiognomy, palmistry, or other like crafty science, or pretending that they can tell destinies, or such other fantastical imaginations; all fencers, bearwards, common players and minstrels; all jugglers, tinkers, and petty chapman, *all wandering persons and common labourers, able in body and refusing to work for the wages commonly given;* all persons delivered out of goals that beg for their fees or travel begging; all persons that wander abroad begging, pretending losses by fire or otherwise, and all persons pretending themselves to be Egyptians." (Emphasis added).

Punishment for being a vagrant was whipping until bloody, incarceration in a house of correction at his home place until employed or banished. One authority has noted that the Florida vagrancy act is "distinctly Elizabethan" and "seems to have been selected at random from the provisions of the Statute of Elizabeth as it was enacted in 1597-98." *Sherry, "Vagrants, Rouges and Vagabonds—Old Concepts in Need of Revision,"* 48 Cal. L. Rev. 557, 560 (1960).

In 1832, Florida enacted its first vagrancy act punishing "any person wandering or strolling about, able to work, or

otherwise support himself in a respectable way, or leading an idle, immoral or profligate course of life. . . ." *Thompson Digest of the Statute Law of the State of Florida*, 4th Division, Title I, Chapter VII, Sec. 12 (1832). The crime was made punishable by the jury at 12 months imprisonment and a $500.00 fine, or 12 months of slavery to the highest bidder, or whipping not to exceed 39 stripes. Minor changes were made in the statute in 1869 and 1905. *Bush, Digest of the Statute Law of Florida, 1872*, Ch. XLVIII, Sec. 24; *Laws of Florida, 1905*, Ch. 5419, Sec. 1. In 1907, the statute under review was enacted and remains in force today. *Laws of Florida, 1907*, Ch. 5720, Sec. 1.

In *Headley v. Selkowitz*, 171 So. 2d 368 (Fla. 1965), the Supreme Court of Florida held that all vagrancy statutes and ordinances in the State should be "applied cautiously and sparingly and only in the most obvious and aggravated cases. Persons should not be charged with vagrancy unless it is clear that they are vagrants of their own volition and choice." Id. at 370.

In *Hanks v. State*, 195 So. 2d 49 (3d D.C.A. Fla. 1966), the District Court of Appeal of Florida, Third District, construed the *Wanderer Section* of *Fla. Stat. Sec. 856.02, 12A F.S.A. Sec. 856.02* (1965), as follows:

> "'(P)ersons wandering or strolling around from place to place without any lawful purpose or object' are deemed vagrants under Sec. 856.02, Fla. Stat., F.S.A.
>
> Phrases similar to 'lawful purpose or object' used in vagrancy statutes have been construed to refer to the reason why such person is wandering or strolling from place to place and is not concerned with his mode of making a living. *Thus, the offense is complete if, without good or sufficient reason, one wanders or strolls from place to place.*
>
> * * * * *
>
> The defendant submits that he was not wandering or strolling from place to place, nor was he on foot at all, but in an automobile.

> *The mode of travel is not material.* Nor do we find merit in the contention that the defendant was not wandering because he had already stopped his vehicle and was parked when questioned by the police." Id. at 50-51. (Emphasis added).

In *Johnson v. State*, 216 So. 2d 7 (Fla. 1968), on remand from this Court in *Johnson v. Florida*, 391 U.S. 596 (1968), the Supreme Court of Florida held that the wanderer-section of the statute under review did not apply to a person sitting on a bus bench, that this was not "wandering or strolling."

In summary, it is clear that the *Wanderer Section* of *Fla. Stat. Sec. 856.02, 22A F.S.A. Sec. 856.02* (1965), as construed by the Florida Courts, punishes as "vagrants" all "persons wandering or strolling around from place to place" (i.e. by any mode of travel whether on foot or in a vehicle, *Hanks v. State*, 195 So. 2d 49, 51 (3d D.C.A. Fla. 1966), but having no application to persons sitting on a bus bench, *Johnson v. State*, 216 So. 2d 7 (Fla. 1968), on remand from *Johnson v. Florida*, 391 U.S. 596 (1968)), "without any lawful purpose or object" (i.e. "without good or sufficient reason," *Hanks v. State*, 195 So. 2d 49, 51 (3d D.C.A. 1966)), providing such "persons are vagrants of their own volition and choice," *Headley v. Selkowitz*, 171 So. 2d 368, 370 (Fla. 1965). The statute has withstood constitutional attack in the court below as being derived from "'the genre of vagrancy laws which have long been upheld as necessary regulations to deter vagabondage and prevent crimes and the imposition upon society of able bodied irresponsibles who of their own volition become burdens upon others and particularly on their families for support.'" *Smith v. State*, 239 So. 2d 250, 251 (Fla. 1970).

It now becomes necessary to determine whether the statute as thus construed is constitutional within the meaning of the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

ARGUMENT

II

THE WANDERER SECTION OF FLA. STAT. SEC. 856.02, 22A F.S.A. SEC. 856.02 (1965), AS CONSTRUED BY THE FLORIDA COURTS, IS UNCONSTITUTIONAL ON ITS FACE IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION FOR TWO REASONS:

(A) IT IS DESIGNEDLY SO VAGUE THAT A PERSON OF COMMON INTELLIGENCE CANNOT KNOW WHAT IS FORBIDDEN, THEREBY INVITING ARBITRARY AND DISCRIMINATORY ENFORCEMENT OF THE STATUTE BY STATE AUTHORITIES.

(B) IT IS DESIGNEDLY SO BROAD THAT IT ABRIDGES RIGHTS PROTECTED BY THE UNITED STATES CONSTITUTION, TO WIT: THE RIGHT TO BE FREE FROM UNREASONABLE SEARCHES AND SEIZURES AND THE RIGHT TO TRAVEL.

The law is well-settled that "the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties," that "a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law," *Connally v. General Construction Co.*, 269 U.S. 385, 391 (1926), and that such a vague criminal statute is unconstitutional on its face in violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution regardless of the details of the offense charged. *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939). Likewise the law is equally well-settled that a penal statute which broadly abridges rights protected by the United States Constitution is similarly unconstitutional on its face

regardless of the details of the offense charged. *Thornhill v. Alabama*, 310 U.S. 88, 96-98 (1940); *Coates v. City of Cincinnati*, _____ U.S. _____, 91 S.Ct. 1686 (1971).

A. The Wanderer Section of Fla. Stat. Sec. 856.02, 22A F.S.A. Sec. 856.02 (1965), is so Vague That a Person of Common Intelligence Cannot Know What is Forbidden, Thereby Inviting Arbitrary and Discriminatory Enforcement of the Statute by State Authorities.

The Wanderer Section of *Fla. Stat. Sec. 856.02, 22A F.S.A. Sec. 856.02* (1965) is a classic example of designed vagueness in a penal statute which invites arbitrary and discriminatory enforcement by the police. It is aimed not at any specific criminal conduct, but at a vaguely defined way of life which is thought to lead to crime. As the Supreme Court of Florida states, the Florida Vagrancy Act, like other vagrancy laws, are "'necessary regulations to deter vagabondage and prevent crimes and the imposition upon society of able-bodied irresponsibles who of their own volition become burdens upon others and particularly on their families for support.'" *Smith v. State*, 239 So. 2d 250, 251 (1970). See also *Johnson v. State*, 202 So. 2d 852-855 (Ervin, J. agreeing in part and dissenting in part). Surely this construction of the statute is a frank concession that the law does not purport to prohibit specific acts of criminal conduct, but instead forbids vaguely defined activity by a class of "undesirables" who may in the future commit crimes.

The statute, as construed by the Florida Courts, prohibits anyone from "wandering or strolling" by any mode of travel "without any lawful purpose or object," *Fla. Stat. Sec. 856.02, 22A F.S.A. Sec. 856.02* (1965), which means "without good or sufficient reason." *Hanks v. State*, 195 So. 2d 49, 51 (3d D.C.A. Fla. 1966). A more open-ended penal statute could scarcely be drawn for it clearly authorizes the arrest and conviction of all persons who do not have a

"good or sufficient reason" for traveling. A person of common intelligence is not placed on notice as to what a "good or sufficient reason" for traveling might be. These terms are most vague and subjective for what is a "good or sufficient reason" to one person may not appear so to another. The statute gives no notice as to whether aimless wandering or strolling is "without good or sufficient reason." If so, many of Florida's tourists who wander and stroll aimlessly along the beaches and resort areas of the state are subject to arrest. See *Territory of Hawaii v. Anduha*, 48 F.2d 171 (9th Cir. 1931).

The statute further gives no notice as to whether a person is bound to give a "good or sufficient reason" for his wandering or strolling when stopped by an inquiring police officer or whether the police officer must be satisfied that the reason given is "good or sufficient." "The circumstances that will invariably give rise to arrest and prosecution are left to the discretion of the individual enforcing officer. Thus the manner of enforcement will always depend on the officer's subjective reactions to the conduct which he observes." *Goldman v. Hecht*, 295 F. Supp. 897, 901-902 (D. Colo. 1969). For these and other reasons courts have held that vagrancy laws employing similar terms are unconstitutionally void on their face. *Decker v. Fillis*, 306 F. Supp. 613 (D. Utah 1969) (Salt Lake City vagrancy ordinance punishing "every person who roams about from place to place without any lawful business"); *Karp v. Collins*, 310 F. Supp. 627 (D. N.J. 1970) (New Jersey Statute punishing "any person . . . who is in this state for an unlawful purpose"); *Ricks v. District of Columbia*, 414 F.2d 1097, 1107 (D.C. Cir. 1968) (District of Columbia vagrancy statute punishing "any person who wanders about the streets at late or unusual hours of the night without any visible or lawful business and not giving a good account of himself."). See also *United States v. Margeson*, 259 F. Supp. 256, 268 (E.D. Pa. 1966).

Mr. Justice Boyd in his dissenting opinion in the court below articulated the open-ended vagueness of the statute under review as follows:

> "In our time a large portion of our population retires at an early age and is encouraged to relax in the Florida sunshine. Hundreds of thousands of tourists visit Florida. They should not be required to prove they have a lawful purpose. It would be a contravention of our basic understanding of constitutional rights to jail persons in this state for 'wandering around without having a lawful purpose.' Specifically the requirement that persons who wander around must have a lawful purpose is too vague to notify the public as to what standard of conduct the state requires." *Smith v. State*, 239 So. 2d 250, 251 (Fla. 1970) (Boyd, J. dissenting).

"The plain fact of the matter, of course, is that vagrancy legislation (such as *Fla. Stat. Sec. 856.02, 22A F.S.A. Sec. 856.02* (1965)) is not essentially aimed at the prohibition of very specific conduct, in the service of any very specific regulatory objective. It is purposefully made obscure, to serve the function of a catch-all—what Professor Caleb Foote has rightly called 'the garbage pail of the criminal law.'" Amsterdam, "Federal Constitutional Restrictions on the Punishment of Crimes of Status, Crimes of General Obnoxiousness, Crimes of Displeasing Police Officers and the Like," *3 Crim. L. Bull.* 205, 219 (1967).

The Attorney General of the State of Florida does not essentially disagree with this assessment. With commendable candor, he states that statutes proscribing wandering as does *Fla. Stat. Sec. 856.02, 22A F.S.A. Sec. 856.02* (1965) "are regulatory measures enacted to prevent crimes and promote the safety of the community" without which "law enforcement officers will be forced to stand idle, completely immobilized by constitutional restraints" while persons stalk the streets intent upon committing crime. Response to Petition for Writ of Certiorari to The Supreme Court of Florida 6-7. Surely this is a candid admission that the statute is aimed at conduct which falls short of specific criminal acts and

empowers the police to arrest persons on mere suspicion that they intend to commit future crimes. Moreover, the contention that the police are "completely immobilized by constitutional restraints" without vagrancy laws is clearly a gross exaggeration. See *Terry v. Ohio*, 392 U.S. 1 (1968).

Mr. Justice Frankfurter aptly summarized the constitutional vice of such purposely-vague vagrancy-type legislation in *Winters v. New York*, 333 U.S. 507 (1948) (Frankfurter, J. dissenting):

> "Only a word needs to be said regarding Lanzetta v. New Jersey. . . . The case involved a New Jersey statute of the type that seeks to control 'vagrancy.' These statutes are in a class by themselves, in view of the familiar abuses to which they are put. See Note, 47 Col. L. Rev. 613, 625. Definiteness is designedly avoided so as to allow the net to be cast at large, to enable men to be caught who are vaguely undesirable in the eyes of police or prosecution, although not chargeable with any particular offense. In short, these 'vagrancy statutes' and laws against 'gangs' are not fenced in by the text of the statute or by the subject matter so as to give notice of conduct to be avoided". *Winters v. New York*, 333 U.S. at 540 (Frankfurter, J. dissenting).

In *Lanzetta v. New Jersey*, 306 U.S. 451 (1939), this Court held that an open-ended New Jersey "gangster" statute was unconstitutionally void for vagueness on its face. The statute punished any "person not engaged in any lawful occupation, known to be a member of a gang consisting of two or more persons, who has been convicted (of a crime or at least three disorderly person offenses)". The *Wanderer Section* of *Fla. Stat. Sec. 856.02, 22A F.S.A. Sec. 856.02* (1965) is the same type of open-ended penal statute designed to suppress an undesirable class of people. The New Jersey statute was aimed at "gangsters" and the Florida statute is aimed at "vagrants". Both statutes are alleged crime control measures designed to prevent crime prior to any overt criminal acts. As Justice Frankfurter noted in his *Winters*

dissent, this vagrancy type legislation is a classic example of a catch-all criminal statute.

In *Coates v. City of Cincinnati*, _____ U.S. _____, 91 S. Ct. 1686 (1971), this Court held an open-ended vagrancy-type ordinance unconstitutionally void for vagueness. The ordinance made it a crime for "three or more persons to assemble . . . on any of the sidewalks . . . and there conduct themselves in a manner annoying to persons passing by . . . ." Like Florida's statute, this ordinance allowed the police to arrest persons who were vaguely undesirable in the eyes of the authorities. The term "annoying" was found by the Court to be too vague, just as the terms "without any lawful purpose or object" (i.e., "without good or sufficient reason") are too vague and open-ended.

In *Lazarus v. Faircloth*, 301 F. Supp. 266 (S.D. Fla. 1969), reversed on other grounds, *Shevin v. Lazarus*, 91 S. Ct. 1218 (1971), the Court held that *Fla. Stat. Sec. 856.02, 22A F.S.A. Sec. 856.02* (1965) was unconstitutionally void for vagueness in its entirety. The Court stated:

> "Contrasted with these constitutional principles so basic to freedom is the avowed purposeful indefiniteness of vagrancy statutes. Vagueness is the hallmark of these laws, so that the authorities are not restrained by definite boundaries of the text. This feature allows 'the net to be cast at large, to enable men to be caught who are vaguely undesirable in the eyes of police and prosecution.' Winters v. People, 333 U.S. 507, 540 . . . ." *Lazarus v. Faircloth*, 301 F. Supp. at 272.

In addition, it is in accord with many cases throughout the country which have held vagrancy-type legislation to be too vague to withstand constitutional tests.[1]

[1] E.g., *Ricks v. District of Columbia*, 414 F.2d 1097 (D.C. Cir. 1968); *Ricks v. United States*, 414 F.2d 1097 (D.C. Cir. 1968); *Alegata v. Commonwealth*, 231 N.E.2d 201 (Mass. 1967); *Fenster v. Leary*, 229 N.E.2d 426 (N.Y. 1967); *City of Seattle v. Drew*, 423 P.2d 522 (Wash. 1967); *Arnold v. City and County of Denver*, 464 P.2d 515 (Colo. 1970); *State v. Grahovac*, 480 P.2d 148 (Hawaii 1971); *State v. Starks*, 9 Crim. L. Rep. 2140 (Wis. May 4, 1971);

The Supreme Court of Florida in its decision in the instant case declined to follow *Lazarus v. Faircloth*, 301 F.Supp. 266 (S.D. Fla. 1969). *Smith v. State*, 239 So.2d 250, 251 (Fla. 1970). Although this Court reversed and remanded *Lazarus* "for reconsideration in light of *Younger v. Harris* . . ," 91 S.Ct. 1218 (1971), it is submitted that the analysis made by the case on the merits is eminently correct.

The Fifth Circuit Court of Appeals in *United States v. Kilgen*, 431 F.2d 627 (5th Cir. 1970), also held that a municipal vagrancy ordinance which tracked *Fla. Stat. Sec. 856.02, 22A F.S.A. Sec. 856.02* (1965), was "unconstitutional for vagueness and overbreadth." *Id.* at 631. The Court specifically adopted the authority of *Lazarus v. Faircloth*, 301 F. Supp. 266 (S.D. Fla. 1969).

It is true, of course, that this Court has sustained numerous statutes employing relatively imprecise language against

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Knowlton v. State, 257 A.2d 409 (Me. 1969); *Parker v. Municipal Judge of the City of Las Vegas*, 427 P.2d 642 (Nev. 1967); *Commonwealth v. Carpenter*, 91 N.E.2d 666 (Mass. 1950); *City of Detroit v. Bowden*, 149 N.W.2d 771 (Mich. App. 1967); *City of Cleveland v. Forrest*, 223 N.E.2d 661 (Mun. Ct. Ohio 1967); *In re Newbern*, 350 P.2d 116 (Cal. 1960); *People v. Diaz*, 151 N.E.2d 871 (N.Y. 1958); *People v. Belcastro*, 190 N.E. 301 (Ill. 1934); *City of Akron v. Efflaud*, 174 N.E.2d 285 (Ohio App. 1960); *Soles v. City of Vadalia*, 90 S.E.2d 249 (Ga. App. 1955); *Ex Parte Hudgins*, 103 S.E. 327 (W. Va. 1920); *City of St. Louis v. Gloner*, 109 S.W. 30 (Mo. 1908); *City of St. Louis v. Roche*, 31 S.W. 915 (Mo. 1895); *Ex Parte Mittelstadt*, 297 S.W.2d 153 (Tex. Crim. 1956); *State v. Caez*, 195 A.2d 496 (N.J. Super. 1963); *Territory of Hawaii v. Anduha*, 48 F.2d 171 (9th Cir. 1931); *Karp v. Collins*, 310 F. Supp. 627 (D. N.J. 1970); *Gordon v. Schiro*, 310 F. Supp. 884 (E.D. La. 1970); *Scott v. District Attorney*, 309 F. Supp. 833 (E.D. La. 1970); *Decker v. Fillis*, 306 F. Supp. 613 (D. Utah 1969); *Kirkwood v. Ellington*, 298 F. Supp. 461 (W.D. Tenn. 1969); *Broughton v. Brewer*, 298 F. Supp. 260 (S.D. N.D. Ala. 1969); *Goldman v. Knecht*, 295 F. Supp. 897 (D. Colo. 1969); *Smith v. Hill*, 285 F. Supp. 556 (E.D. N.C. 1968); *Landrey v. Daley*, 280 F. Supp. 968 (N.D. Ill. 1968); *Baker v. Binder*, 274 F. Supp. 658 (W.D. Ky. 1967); *Carmichael v. Allen*, 267 F. Supp. 985 (N.D. Ga. 1967); *United States v. Margeson*, 259 F. Supp. 256 (E.D. Pa. 1966). Also see, *Wheeler v. Goodman*, 306 F. Supp. 58 (W.D. N.C. 1969), reversed on other grounds, 91 S. Ct. 1219 (1971).

a vagueness attack. None of these statutes however, approach the deliberately vague and open-ended vagrancy legislation now under review. Most of the validating decisions involve industrial or economic regulatory statutes designed to meet specific problems in our modern society with as much specificity as the subject will allow dealing with a rather limited range of activities—i.e., carrying explosives, operating vehicles, selling goods, charging rent.[2] See Amsterdam Federal Constitutional Restrictions on the Punishment of Crimes of Status, Crimes of General Obnoxiousness, Crimes of Displeasing Police Officers, and the Like, *3 Crim. L. Bull. 205*, 218-219 (1967). Other validating decisions outside the industrial and economic regulation area have similarly dealt with specific modern problems involving a rather limited range of activities—i.e. taking income tax deductions, trespassing on the property of others, operating noisy sound trucks on the public streets, engaging in criminal group libel, threatening violence against F.C.C. licensees.[3] None of the statutes upheld can be described as open-ended catchalls.

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[2]E.g., *Boyce Motor Lines, Inc. v. United States*, 342 U.S. 337 (1952) ("so far as practicable" drivers carrying explosives shall avoid tunnels, congested places, etc.); *Sproles v. Binford*, 286 U.S. 374 (1932) (exempting from certain motor vehicle restrictions vehicles used only to transport property from a common carrier "by way of the shortest practicable route" to destination); *United States v. National Dairy Products Co.*, 374 U.S. 29 (1963) (selling goods at "unreasonably low prices" for purposes of destroying competition or eliminating a competitor; statute sustained at least as to persons selling below cost); *Levy Leasing Co. v. Siegel*, 258 U.S. 242 (1922) (providing a defense to an action for rent that the rent charged is "unjust and unreasonable"); *Old Dearborn Co. v. Seagram Corp.*, 299 U.S. 183 (1936) (sanctioning certain sale contracts of commodities which are "in fair and open competition" with commodities of the same general class).

[3]E.g., *United States v. Ragen*, 314 U.S. 513 (1941) (permitting "a reasonable allowance for salaries or other compensation for personal services actually rendered" as a federal corporate income tax deduction); *Adderly v. Florida*, 385 U.S. 39 (1966) (trespassing "upon property of another, committed with a malicious and mischievous intent"); *Kovacs v. Cooper*, 336 U.S. 77 (1949) (operating sound

In contrast, *Fla. Stat. Sec. 856.02, 22A F.S.A. Sec. 856.02* (1965) is a purposely vague catchall. It deals, not with a limited range of activities, but with a vaguely defined way of life. *Smith v. State*, 239 So. 2d 250, 251 (Fla. 1970); *Johnson v. State*, 202 So. 2d 852-855 (Ervin, J. agreeing in part and dissenting in part). It does not even purport to deal with the problems of modern life. Its language "reflects the historic verbiage of vagrancy laws which date back 620 years to the English Statute of Laborers" and is aimed at people and conditions which no longer exist. *Lazarus v. Faircloth*, 301 F. Supp. 266, 271 (S.D. Fla. 1969). Also see *Ledwith v. Roberts*, (1937) 1 K.B. 232, 276-277. Indeed "'a college English major might read it as a casting advertisement in an Elizabethan newspaper for the street scene in a drama of that era'." *United States v. Kilgen*, 431 F.2d 627, 628 (5th Cir. 1970) (describing a city ordinance which tracks *Fla. Stat. Sec. 856.02, 22A F.S.A. Sec. 856.02* (1965)). It is surely "one of the most charming grabbags of criminal prohibitions ever assembled." *Landrey v. Daley*, 280 F. Supp. 968 (N.D. Ill. 1968). As such, it stands quite apart from all of the other statutes which have been upheld against a vagueness attack in this Court.

There is another constitutional objection to the Wanderer Section of *Fla. Stat. Sec. 856.02, 22A F.S.A. Sec. 856.02* (1965), that is directly related to its vague and open-ended nature, namely, that it invites arbitrary and discriminary

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trucks, calliopes and other loudspeaker devices on the public streets, when such devices emit "loud and raucous noises"); *Beauharnais v. Illinois*, 343 U.S. 250 (1952) (manufacturing, selling, publishing, exhibiting various publications which portray "depravity, criminality, unchastity, or lack of virtue of a class of citizens, or any race, color, creed or religion which said publication or exhibition exposes the citizens of any race, color, creed or religion to contempt, derision, or obloquy or which is productive of breach of the peace or riot . . . ."); *United States v. Petrillo*, 332 U.S. 1 (1947) (using express or implied threats of force, violence, intimidation, duress to coerce an F.C.C. licensee into hiring a person or persons "in excess of the number of employees needed by such licensee to perform actual services").

enforcement by state authorities. This Court has recognized that an over-vague penal statute "licenses the jury to create its own standards in each case." *Herndon v. Lowry*, 301 U.S. 242, 263 (1937). It is "susceptible of sweeping and improper application" *N.A.A.C.P. v. Button*, 371 U.S. 415, 433 (1963), furnishing a convenient tool for "harsh and discriminatory enforcement by prosecuting officials against particular groups deemed to merit their displeasure." *Thornhill v. Alabama*, 310 U.S. 88, 97-98 (1940). It "lends itself to selective enforcement against unpopular causes," *N.A.A.C.P. v. Button*, 371 U.S. 415, 435 (1963). It "contains an odious invitation to discriminatory enforcement against those whose association together is 'annoying' because their ideas, their lifestyle, and their physical appearance is resented by the majority of their fellow citizens." *Coates v. City of Cincinnati*, ___ U.S. ___, 91 S.Ct. 1686, 1689 (1971).

The Court in *Territory of Hawaii v. Anduha*, 48 F.2d 171 (9th Cir. 1931), accurately described the arbitrary and discriminatory methods by which vagrancy legislation is enforced:

> "It is almost needless to say that such an act cannot be enforced, and no attempt will be made to enforce it, indiscriminately. It may be enforced against those poor hapless ones who are unable to assert or protect their rights, but as to all others it will remain a dead letter. It may be enforced to suppress one class of idlers in order to make a place more attractive to another class of idlers of a more desirable class." *Id.* at 173.

To give law enforcement authorities such dictatorial power over the streets, to leave in their discretion the unfettered authority to determine who is undesirable and subject to arrest, is to take a long step down the totalitarian road. Where a penal statute, as The Wanderer Section of *Fla. Stat. Sec. 856.02, 22A F.S.A. Sec. 856.02* (1965), is designed to be vague and open-ended, it invites "government by the moment-to-moment opinions of a policeman on his beat." *Cox v. Louisiana*, 379 U.S. 536, 579 (1965) (Black, J.

concurring). It invites arbitrary arrests and convictions for committing essentially innocent acts. *Palmer v. City of Euclid*, ___ U.S. ___, 29 L.Ed.2d 98 (1971) (discharging a passenger from a car late at night); *Johnson v. Florida*, 391 U.S. 596 (1968) (sitting on a bus bench at 2:00 A.M.); *Hicks v. District of Columbia*, 383 U.S. 252 (1966) (playing a guitar in a public park in the afternoons); *Thompson v. City of Louisville*, 362 U.S. 199 (1960) (dancing to a jukebox in a cafe). By design, it sets "a net large enough to catch all possible offenders" and leaves courts and juries "to step inside and say who should be rightfully detained and who should be set free." *United States v. Reece*, 92 U.S. 214, 221 (1876). "(T)hat kind of law bears the hallmark of a police state." *Shuttlesworth v. City of Birmingham*, 382 U.S. 87, 91 (1966).

(B) The Wanderer Section of Fla. Stat. Sec. 856.02, 22A F.S.A. Sec. 856.02 (1965) Is Designedly So Broad that It Abridges Rights Protected by the United States Constitution, To Wit: The Right To Be Free From Unreasonable Searches and Seizures and The Right To Travel.

There is a second constitutional vice in the Wanderer Section of *Fla. Stat. Sec. 856.02, 22A F.S.A. Sec. 856.02* (1965), namely, it is so broad in its ambit that it abridges certain rights protected by the United States Constitution. Implicit in the foregoing analysis is that this catchall statute permits law enforcement officials to arrest persons on mere suspicion in violation of their right to be free from unreasonable searches and seizures guaranteed against state invasion by the Fourth and Fourteenth Amendments. Indeed this seems to be the main purpose of such laws as Mr. Justice Frankfurter noted in his *Winters* dissent.

Mr. Justice Boyd dissenting in the court below articulated this constitutional objection as follows:

> "Vagrancy statutes have been widely used by police authorities to hold people remotely suspected of

crime while investigations were conducted. Modern interpretations of individual civil rights under state and federal constitutions prohibit this now. If one is engaging in unlawful conduct the state should charge the person with violating a specific law. There is certainly no shortage of criminal laws." *Smith v. State*, 239 So.2d 250 (1970) (Boyd, J. dissenting).

It is widely recognized that a vagrancy charge is "'simply a subterfuge that is used to hold persons for investigation.'" *State v. Alford*, 225 So.2d 582, 585 (2d D.C.A. Fla. 1969). Vagrancy in fact is the crime of arrest and detention on suspicion. *Douglas, "Vagrancy and Arrest on Suspicion"* 70 Yale L.J. 1 (1960). There are two aspects to such arrests. "The alleged vagrant may be suspected of *past criminality*, the arrest for vagrancy offering the opportunity to investigate whether the suspect is wanted in another jurisdiction or has committed other crimes. On the other hand, the suspicion may be of *future criminality*, the inference being that purposeful poverty is likely to lead to other crimes unless the state steps in." *Foote, "Vagrancy–Type Law and Its Administration,"* 104 U. Pa. L. Rev. 603, 625 (1956). Vagrancy laws "appear to be designed to enable the police to arrest persons suspected of having committed or about to commit offenses." *A.L.I. Model Penal Code* (Tent. Draft No. 13, 1961) Comments to Sec. 250.12, Suspicious Loitering. "Vagrancy laws provide authority to hold a suspect for investigation and interrogation when the police could not legally arrest him for another offense." *Task Force Report, The Courts 102* (President's Commission on Law Enforcement and Administration of Justice 1967).

Other authorities have also documented that vagrancy statutes are used as catchalls so that the police may make arrests on mere suspicion and without probable cause. *LaFave, "Detention for Investigation by the Police: An Analysis of Current Practices"* 1962 Washington L.Q. 331; *LaFave, "Penal Code Revision: Considering the Problems and Practices of the Police,"* 45 Tex. L. Rev. 434, 451-452

(1967); *Lacey, "Vagrancy and Other Crimes of Personal Condition,"* 66 Harv. L. Rev. 1203, 1218-1219; *Note, The Vagrancy Concept Reconsidered: Problems and Abuses of Status Criminality*, 37 N.Y.U.L. Rev. 102, 129-130 (1962); *Note, Use of Vagrancy-Type Laws for Arrest and Detention of Suspicious Persons*, 59 Yale L.J. 1351 (1950).

The District of Columbia Circuit Court of Appeals in *Ricks v. District of Columbia*, 414 F.2d 1097 (D.C. Cir. 1968), discussed at length how vagrancy-type laws are openly used by law enforcement officials to sweep the streets of persons who are vaguely undesirable in the eyes of the police although they have committed no overt criminal act. "The record exposes vagrancy enforcement as a device utilized not only to inflict punishment for suspected but unprovable violations in progress but also, through preventive conviction and incarceration, to suppress crime in the future." *Id.* at 1108-1109.

The Fourth Amendment, as applied to the States under the Due Process Clause of the Fourteenth Amendment, *Mapp v. Ohio*, 367 U.S. 643 (1961), prohibits arrests on mere suspicion of past or future criminality, e.g. *Beck v. Ohio*, 379 U.S. 89 (1964); *Wong Sun v. United States*, 371 U.S. 471 (1963); *Henry v. United States*, 361 U.S. 98 (1959), *Sibron v. New York*, 392 U.S. 41 (1968). By authorizing and inviting such unreasonable seizures of the person, the Wanderer Section of *Fla. Stat. Sec. 856.02, 22A F.S.A. Sec. 856.02* (1965) clearly overreaches basic Fourth Amendment rights. Indeed, it abridges the very core of Fourth Amendment protection by invading "the security of one's privacy against arbitrary intrusion by the police," *Wolf v. Colorado*, 338 U.S. 25, 27 (1949).

In addition, another basic constitutional right is abridged by the statute: the right to travel. "The constitutional right to travel from one state to another, and necessarily to use the highways and other instrumentalities of interstate commerce in doing so, occupies a position fundamental to the conception of our Federal Union. It has been a right that

has been firmly established and repeatedly recognized." *United States v. Guest*, 383 U.S. 745, 757 (1966) and cases collected. "The right to travel is part of the 'liberty' of which the citizen cannot be deprived without due process of law . . . . Freedom of movement across frontiers in either direction, and inside frontiers as well, was part of our heritage. Travel abroad, like travel within the country . . . may be as close to the heart of the individual as the choice of what he easts, or wears or reads. Freedom of movement is basic to our scheme of values." *Kent v. Dulles*, 357 U.S. 116, 127 (1958), quoted with approval in *Aptheker v. Secretary of State*, 378 U.S. 500, 505-506 (1964). See also *Edwards v. California*, 314 U.S. 160 (1941).

The Florida Statute in question forbids "wandering or strolling" by any mode of travel "without any lawful purpose or object," which means "without good or sufficient reason." These are broad and sweeping restrictions on the right to travel which "certainly chill the liberty of lawful movement" by covering "any person loitering or even window shopping on the streets." *Decker v. Fillis*, 306 F. Supp. 613, 617 (D. Utah 1969) (Salt Lake City vagrancy ordinance punishing "every person who roams about from place to place without any lawful business"). Florida's greatest industry is tourism—yet the broad ambit of this statute allows the police to determine who are the desirable travelers and who are not. See *Territory of Hawaii v. Anduha*, 48 F.2d 171 (9th Cir. 1931). The statute clearly overreaches the federally protected right to travel.

CONCLUSION

For the above-stated reasons the judgment of the Supreme Court of Florida should be reversed and the cause remanded with directions to order a discharge of the Petitioners from the cause.

Respectfully submitted,

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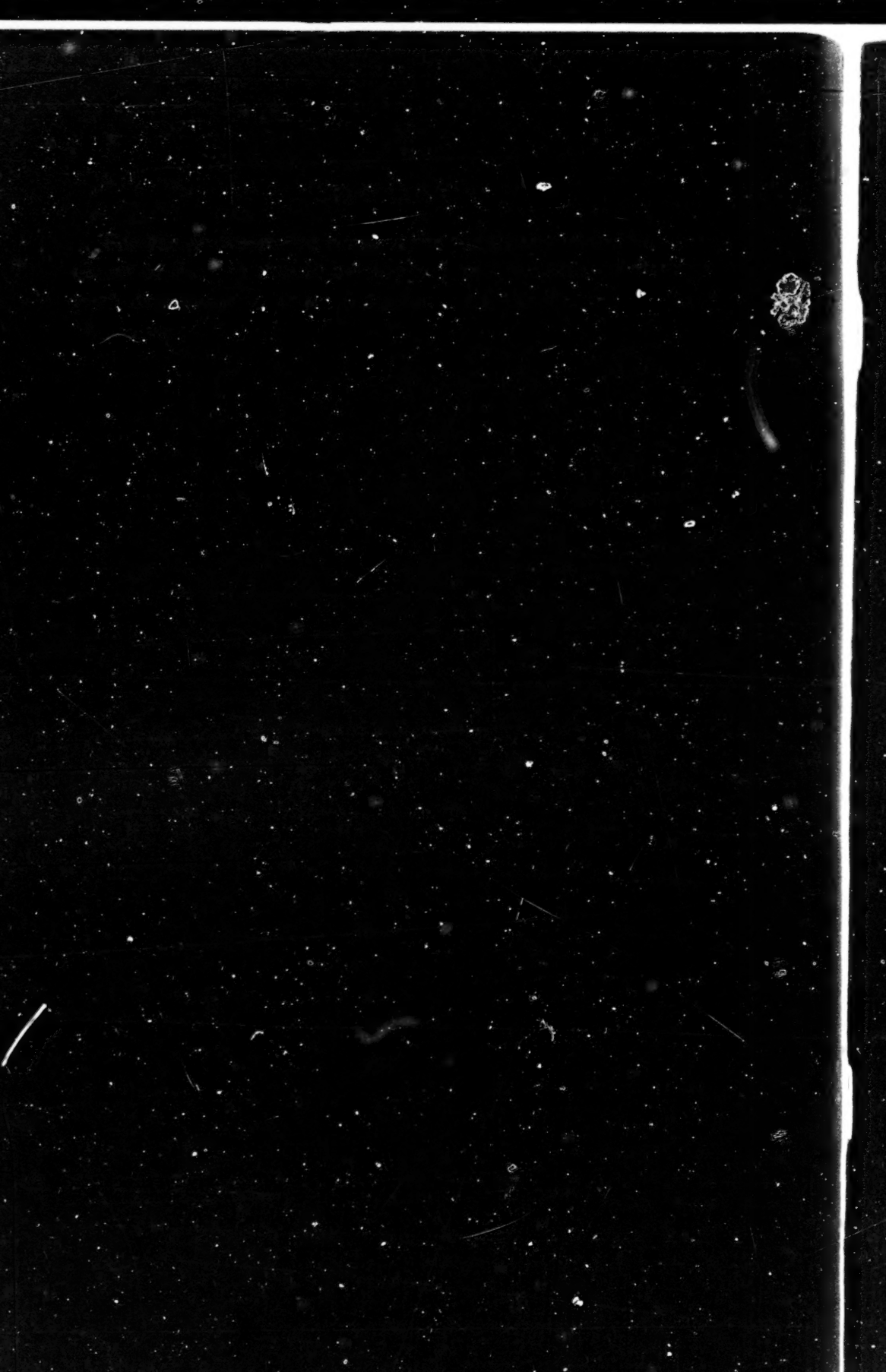

IN THE

Supreme Court of the United States

NO. ~~69-84~~ 70-5055

RAYMOND SMITH and
MELVIN McCLAIN,

Petitioners,

v

STATE OF FLORIDA,

Respondent.

BRIEF OF THE RESPONDENT

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OTHER AUTHORITY

QUESTION PRESENTED

The sole issue before the Court is whether Florida Statute, § 856.02, --- wherein it proscribes the act of wandering or strolling around from place to place without any lawful purpose or object,"--- fails to proscribe an ascertainable standard of criminal conduct as required by the Due Process clause of the Fourteenth Amendment to the United States Constitution.

ARGUMENT

"The underlying principle is that no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed."[1]

Resolution of the question of whether the challenged provision of Florida's vagrancy statute is "void for vagueness", and thus violative of constitutional due process requirements of notice, hinges on whether that portion of the vagrancy statute complies with the forgoing principle.

The State of Florida respectfully yet firmly maintains that the challenged portion of the State's vagrancy law is constitutionally sound: that the statute adequately and specifically describes the acts prohibited, thus complying with due process requirements of notice.

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1. United States v Harriss, 347 US 612, 617, 98 L. ed 989, 74 S.Ct. 808; Palmer v City of Euclid, _____ US _____, No. 143, May 24, 1971(9Cr.L.R. 3175).

POINT I

MEN OF ORDINARY INTELLIGENCE NEED NOT GUESS OR DIFFER AS TO THE MEANING OF THE CHALLENGED PROVISION IN FLORIDA'S VAGRANCY STATUTE.

Necessarily, when a man of ordinary intelligence wanders or strolls about he does so with some objective or purpose in mind. His purpose for strolling may be only to exercise his legs, stimulate blood circulation, and foster good health. One's reason for aimlessly driving his automovile around from place to place may be to "find his bearings", to seek adventure in unknown places, or simply to view the scenery. The objective of a man's walk may be to wander aimlessly afoot, from place to place, alone, thinking. And one's reason for movement may be specifically to go from one location to another. And the purpose may change from one moment to the next. But, regardless of the specific objective at any particular point in time, when a person wanders around he does in fact have an objective. And Florida's vagrancy statute makes the wandering or strolling about itself unlawful, when that objective or purpose is an unlawful one.

Florida Statute, § 856.02, proscribes:

"...wandering or strolling around from place to place without any lawful purpose or object..."

The law does not prohibit wandering and strolling about without any purpose, rather it proscribes wandering or strolling about without any lawful purpose. The distinction is significant. When one wanders or strolls around he necessarily does have some purpose, and it is only when that purpose is not a lawful purpose that the statutory provision under consideration is applicable. CF. Johnson v Florida, 391 US 596, 20 L.ed 2d 838.

It is no answer to the foregoing argument to suggest that a person may be senile or insane --- wandering around with in fact no purpose whatsoever --- because the vagrancy statute does not address itself to this type of conduct. All criminal laws are predicated on volitional conduct. See: Powell v Texas, 392 US 514, 20 L.ed 2d 1254, 88 S.Ct. 2145; and R. Perkins, Criminal Law, at 650-651 (1957). The vagrancy statute under consideration is no exception.

In Headley v Selkowitz(Fla1965) 171 So. 2d 368, the Florida Supreme Court examined a municipal ordinance, providing that one who is found standing, loitering or strolling any place in the city and is not able to give a satisfactory account of himself, or who is without lawful means of support, is guilty of disorderly conduct. The Supreme Court of Florida held the ordinance invalid because it was too vague. In its opinion the court

also discussed Florida Statute, § 856.02, observing:

> "Such statutes and ordinances should be applied cautiously and sparingly and only in the most obvious and aggravated cases. Persons should not be charged with vagrancy unless it is clear they are vagrants of their own volition and choice. Innocent victims of misfortune ostensibly appearing to be vagrants, but who are not such either by choice or intentional conduct should not be charged with vagrancy."(emphasis added) Headley v Selkowitz, supra, at 370.

[In passing, note the similarity between the municipal ordinance ruled unconstitutionally vague in Headley v Selkowitz, supra, and the municipal ordinance ruled impermissibly vague by this Court in Palmer v City of Euclid, supra.]

What is the alleged insurmountable problem in a citizen's knowing what is a "lawful purpose or object?" It seems apparent that the average citizen who has any regard for what is lawful vel non, and who desires to avoid the law's proscription may do so. State v McGorvey(Minn1962) 114 NW 2d 703. Indeed, the term is no more vague than numerous others upheld by this Court: Adderly v Florida, 385 US 39, 17 L.ed 2d 149, 87 S. Ct. 242, reh. den. 385 US 1020, 17 L.ed 2d 559, 87 S.Ct. 698(malicious or mischievous trespass); Tinsley v City of Richmond(Va.1961) 119 SE 2d 488, appeal dismissed for want of

substantial federal question, 368 US 18 (1961) (loitering in public street; attacked as vague and beyond police power); Beauharnais v Illinois, 343 US 250, 96 L.ed 919, 72 S.Ct. 725(exposing citizens to derision or obloquy); Boyce Motor Lines, Inc. v United States, 342 US 337, 96 L.ed 367, 72 S.Ct. 329; Kovacs v Cooper, 336 US 77-106, 93 L.ed 513 (loud and raucous noises); United States v Petrillo, 332 US 1, 91 L.ed 1877 (in excess of the number of employees needed); United States v Ragen, 314 US 513, 86 L.ed 383 (reasonable allowance); Old Dearborn Distributing Co. v Seagram Distillers Corp., 299 US 183, 81 L.ed 109 (in fair and open competition); Spróles v Binford, 286 US 374, 76 L.ed 1167 (shortest practicable route); Mahler v Ely, 264 US 32, 68 L.ed 549 (undesirable residents); Levy Leasing Co. v Siegel, 258 US 242, 66 L.ed 595 (unjust rent)

The Petitioners assert that tourists and retirees strolling in the Florida sunshine fall within the ambit of Florida Statute, § 856.02. Petitioners would have this Court believe that the challenged provision of the Florida vagrancy statute allows police officers to snare a tourist enjoying the sun and surf, or pounce upon an unsuspecting senior citizen in the course of his early morning constitutional.

Thousands of tourists and senior citizens unquestionably do wander about Florida every year. But they need not

guess or differ as to whether they are vagrants: because although they may have no expressly stated purpose or object in mind, neither the Florida Legislature nor its police and courts, or, indeed, the tourists and senior citizens themselves, have ever questioned that they do in fact have a lawful purpose or object. CF. Territory of Hawaii v Anduna (9thCir.1931) 48 F.2d 1711, holding unconstitutional a loitering statute which did not qualify the reason for, or reasonableness of, the loitering. Also, Palmer v City of Euclid, supra.

Petitioners can make this assertion only by changing the wording of the portion of the vagrancy statute at bar: by changing the phrase "without any lawful purpose or object" to read "without any particular and expressed purpose or object in mind." Neither the facts nor reason or plain old common sense would support Petitioners' proposition that Florida's vagrancy statute renders "strolling in the sunshine" a crime.

The basic principle, then, is that, "a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process", Connally v General Construction Co., 269 US 385, 391, 70 L.ed 325. The State of

Florida maintains that its vagrancy statute is crystal clear; even though the clarity of a crystal is not the standard applicable, for, as this Court itself has long recognized:

> "ew words possess the precision of mathematical symbols, most statutes must deal with unforseen variations in factual situations and the practical necessities of discharging the business of government inevitibly limit the specificity with which legislators can spell out prohibitions." Boyce Motor Lines, Inc. v United States, supra, at 340.

The difficulty comes not with the test, but with its application.

The difficulty with application of the vagrancy statute revolves around questions of proof of intent, i.e., of an unlawful "objective or purpose". However, problems concerning proof of a specific intent under this statute are no different than difficulties in proving specific intents such as are raised by many other criminal statutes: e.g., the crimes of breaking and entering to commit grand larceny, breaking and entering with intent to commit rape; on the crimes of larceny, burglary, forgery, uttering, and using the mails with intent to defraud, all being crimes which require proof of a special mental element or a specific intent. Bear in mind, though, that it is the constitutional

validity of the specific vagrancy provision at bar, and not difficulties of proof in administering the law, which is the issue before the Court.

POINT II

THERE ARE SEVERAL FACTORS PRESENTED IN PETITIONERS' BRIEF WHICH ARE IRRELEVANT TO ISSUES PROPERLY BEFORE THIS COURT IN THE CASE AT BAR.

It is important to note that the Petitioners have properly challenged only that segment of the vagrancy statute which prohibits "...wandering or strolling around from place to place without any lawful purpose or object..." Florida Statutes, § 856.02. The sole contention argued in their original petition to this Court was the issue of whether the specific portion of the vagrancy statute was so vague as to be violative of due process requirements of notice. Yet in the final segment of the Petitioners' Brief on the Merits they argue that the vagrancy provision at bar abridges constitutionally protected rights to travel and against unreasonable searches and seizures. These two new issues never were argued to, or considered by, the state courts of Florida in this case.

An examination of the Florida Supreme Court's opinion (Appendix, 42-44) affirmatively establishes these issues were not under advisement, and that in reaching its conclusion the Supreme Court of Florida was neither directly or indirectly considering these propositions now argued by Petitioners. Furthermore, a perusal

of the Petitioners' joint motion for a new trial(Appendix 37-38), and of their notice of appeal(Appendix 36), and, particularly of their assignments of error(Appendix 40-41) fails to reveal where the Petitioners ever presented these issues to the state courts of Florida in this case.

Once a case reaches the United States Supreme Court, review is limited to the specific federal questions which were raised in the state courts. Whitney v California, 274 US 357, 71 L.ed 1095; Wilson v Cook, 327 US 485, 496, 96 L. ed 793; Adler v Board of Education, 342 US 485, 496, 96 L.ed 517; State Farm Mutual Insurance v Duel, 324 US 154, 160-161, 89 L.ed 813. The Petitioners are precluded from raising new federal issues neither argued or considered below, even if the issues properly might have been raised in the state courts. See: Safeway Stores v Oklahoma Grocers, 360 US 334, 342, n.7, 3 L.ed 2d 1280. Since the Petitioners never presented either of these two federal questions to the state courts below, they have waived them as grounds for objection to the state's vagrancy statute. Henderson v Georgia, 295 US 441, 443, 79 L.ed 1530; Beck v Washington, 369 US 541, 553, 8 L.ed 2d 98.

The Petitioners go afield in another respect. Their Brief on the Merits contains a somewhat exhaustive, educational and entertaining, but nevertheless irrelevant, history of vagrancy legislation in medieval England. The fact that in medival England people who wandered from place to place were feared and regarded as criminals, and were severely punished by whipping, slavery or death is no more a reason to invalidate the present Florida vagrancy statute than is the fact that larceny, presently a crime in Florida, was punished by cutting one's hand off in medival England. Likewise, the fact that the English Parliament originally passed vagrancy legislation with the intent of keeping the freed surfs inside their parish or "home on the farm" is irrelevant. It hardly can be asserted by Petitioners that the Florida Legislature and Florida courts passed and construe the present vagrancy statute with that same intent in mind. [The intent of modern-day vagrancy statutes is discussed infra.]

Whether or not Florida's vagrancy statute was derived from the genre of early English vagrancy laws which were harsh in intent and punishment is not at issue. The history of Florida's vagrancy statute is not on trial. Its present status is: What the challenged section of Florida Statute, § 856.02, prohibits today in the State of Florida

and whether it is constitutionally over vague in doing so is the issue now before this Court. Acts proscribed by this and similar vagrancy statutes in the Country of England or the State of Florida in 1349, 1597, 1832, or 1907 are irrelevant.

Petitioners' brief is irrelevant to issues at bar in still another respect. The wording of present-day vagrancy statutes varies significantly from one jurisdiction to another, and the courts have invalidated or upheld them under attacks substantially different from the one presented in the instant case. For example, many states had statutes which condemned one who loathes, idles or liters on a public street, but without qualification as to the reason one is on the public street. The following cases cited by Petitioners condemned this type of statute: Soles v City of Vadalia (Ga.App 1955) 90 SE 2d 249 [not based on constitutionality]; Commonwealth v Carpenter(Mass1950) 91 NE 2d 153 [not vagueness; court distinguished and approved state vagrancy provision similar to instant one]; People v Diaz, 4 NY 2d 469, 151 F.Supp.658; and Ricks v District of Columbia (DC Cir. 12/23/68) 37 US L.W. 2367-68. The cases of Fenster v Leary(1967) 20 NY 2d 309, 229 NE 2d 426, and In re: Newborn(Cal.1950) 350 P.2d 116 [dealt with term"common drunkard"]

are equally inapplicable.

Not one of the numerous cases cited by Petitioners was demonstrated by them to have struck down a statute containing the same provisions as Florida's here challenged, on the grounds of unconstitutional vagueness.

POINT III

THE VAGRANCY PROVISION AT BAR IS A NECESSARY AND PROPER EXERCISE OF THE POLICE POWER.

Contemporary statutes which prohibit wandering about without lawful purpose or object are regulatory measures enacted to prevent crimes and promote community safety. CF. State v Finrow (Wash.1965) 405 P.2d 600. Although at common law the statutes may have sought to force the idle to work and to keep socially irresponsible persons from wandering about, today they are designed to prevent crimes. CF. Fonte v State (Tenn.1965) 373 SW 2d 445; 91 C.J.S., Vagrancy § 2 (c) (1955). With the modern sociological and psychological orientation on crime prevention in the first instance, as opposed to an emphasis on crime detection and punishment after the event, a properly adminstered vagrancy statute appears to be a more appropriate tool of good law enforcement practices today than ever before in history. Even contemporary legal authorities who are critical of certain provisions in modern vagrancy laws acknowledge that the laws, "serve a necessary purpose and remain an essential means by which law enforcement agencies discharge their primary function of preserving law and order and preventing the commission of crimes." Sherry, Vagrants, Rogues and Vagabonds - Old Concepts in Need of Revision, 48 Cal.L.Rev. 557,566(1966).

Perhaps reference to a hypothetical situation will demonstrate the statute's essential function as a tool of crime prevention. Police Officer John Law received information from a reliable informant often used in the past that Stanley Steal intends to rob the XYZ Liquor Store on the corner of First Street and Main, downtown Centerville, tomorrow night. Stanley Steal told the informant that he is going to "case the joint" tonight at 8:00 by walking past ths store four or five times, and this information is provided by the informant to Officer Law. He also is informed that Stanley Steal will be unarmed tonight, but intends to use a gun in performing the robbery the following evening.

By what theory of constitutional law or common sense is Officer Law to be prohibited from arresting Stanley Steal tonight for "strolling about without any lawful purpose or object?" Is the option of arresting the designing robber tonight instead of later when armed, to be denied the law enforcement officer? Is the officer constitutionally prohibited from using crime prevention rather than crime detection in this situation?

A correctly drawn and properly executed "Stop and Frisk" statute can be of no assistance in the matter. Officer Law

may have grounds for a "stop" --- and possibly even a "frisk" --- but with what charge can he arrest the man if not vagrancy? What other law can he properly use for crime prevention?

Present-day vagrancy provisions such as the one at bar clearly differ from earlier vagrancy law which condemned ecenomic or social conditions rather than volitional acts, and are a reasonable and essential exercise of the police power if our Constitution is to be understood to avoid unnecessarily restraining our police in crime prevention.

Practical experience in law enforcement and common sense in government demand that the rights of citizens implicit in a free society must be counter-balanced with the prospect that law enforcement officers will be forced to stand idle, immobilized by non-essential constitutional restraints, while night time prowlers and apparently resolute thieves or designing rapists stalk without restraint from place to place and neighborhood to neighborhood, from house to house and victim to victim. A balance must be recognized and the scales of justice should be read to sustain the statutory provision at bar.

CONCLUSION

In summary, because the challenged section of the Florida vagrancy statute is a necessary and reasonable exercise of the police power, which does not cause men of common intelligence to guess at its meaning, the judgment of the Florida Supreme Court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Brief of the Respondent was mailed Honorable Phillip A. Hubbart, Public Defender, 1351 Northwest 12th Street, Miami, Florida 33125, this ____ day of _____, 1971.

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of Counsel